

**FEDERAL MINE SAFETY
AND
HEALTH REVIEW COMMISSION**



**AUGUST 1988
Volume 10
No. 8**

DECISIONS

AUGUST 1988

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AUGUST 1988

Review was granted in the following cases during the month of August:

FMC Wyoming Corporation v. Secretary of Labor, MSHA, Docket No. WEST 86-43-RM, etc. (Judge Cetti, June 28, 1988).

Secretary of Labor, MSHA v. Mid-Continent Resources, Inc., Docket No. WEST 87-88. (Judge Morris, July 1, 1988).

Secretary of Labor, MSHA v. El Paso Rock Products, Inc., Docket No. CENT 88-53-M. (Default Order of July 11, 1988).

Review was denied in the following cases during the month of August:

Secretary of Labor, MSHA v. H.B. Zachry Company, Docket No. CENT 88-29-M. (Interlocutory Review of May 23, 1988 Order issued by Judge Melick).

Western Fuels, Utah, Inc. v. Secretary of Labor, MSHA, Docket No. WEST 87-166-R, etc. (Judge Lasher, June 30, 1988).

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 15, 1988

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), :
On Behalf of JOSEPH GABOSI :
 :
v. : Docket No. WEST 86-24-D
 :
WESTERN FUELS-UTAH, INC. :
 :

Before: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY THE COMMISSION:

In this case Commission Administrative Law Judge John J. Morris held that Western Fuels-Utah, Inc. ("Western Fuels") did not violate the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act"), in discharging complainant Joseph Gabossi. 9 FMSHRC 1481 (August 1987) (ALJ). Gabossi had complained to Western Fuels and to the State of Colorado, Division of Mines, that the underground reporting structure at the Deserado Mine created unsafe working conditions, and that it violated Colorado state law. Judge Morris concluded that the firing was lawful because Western Fuels was motivated by Mr. Gabossi's clashes with mine management over the underground reporting structure in effect at Western Fuels' Deserado Mine and that his complaints did not fall within the protective umbrella of the anti-discrimination provisions of section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1). 1/ We disagree.

1/ Section 105(c)(1) provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or

Because Gabossi's conflict with Western Fuels regarding the Deserado Mine's underground reporting structure was safety related, a fact acknowledged by the judge, we conclude that Gabossi engaged in activity protected by the Mine Act. Accordingly, we reverse the decision of the judge and remand the matter for further proceedings consistent with this decision.

I.

Gabossi began working for Western Fuels on October 1, 1982. From that time until he was discharged on January 30, 1985, he served in a dual capacity of mine foreman and underground coal production superintendent at the Deserado Mine located in Rio Blanco County, Colorado. At the time Gabossi began working for Western Fuels John Bootle was the mine manager. Gabossi testified that, under Bootle, he coordinated the underground maintenance activities with the activities of his production crew. Tr. 16-17, 119. In June of 1983, Raja Upadhyay replaced Bootle as mine manager.

On June 29, 1983, Upadhyay issued an organizational memorandum setting forth the responsibilities of the Deserado Mine's four superintendents. Exh. R-1. Pursuant to that organizational memorandum, Gabossi was in charge of underground coal production while Gordon Burnett was in charge of underground maintenance. Although the record is unclear as to whether Gabossi still coordinated the activities of the maintenance and production departments following the issuance of this organizational memorandum, Gabossi testified that from that time until February of 1984 matters became "progressively worse" between himself and mine manager Upadhyay. Gabossi stated that on February 14, 1984, Upadhyay informed him that he "wasn't to interfere with maintenance in any way." Tr. 151-52.

In June of 1984, A.B. Beasley replaced Burnett as the maintenance superintendent. Beasley and Gabossi described their relationship as stormy. Tr. 20, 430. In that regard, Beasley had instructed

health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1).

maintenance foreman Art Cordova to stop reporting his underground activities to Gabossi. Tr. 271-72. Cordova discussed Beasley's instructions with Upadhyay and was told by the mine manager to follow them. Tr. 273. In September or October of 1984, Upadhyay gave Gabossi his own "breakdown" mechanic for each production shift but preventative underground maintenance remained under the control of maintenance superintendent Beasley. Tr. 23.

Gabossi's and Upadhyay's relationship continued to deteriorate. According to Upadhyay, in September, 1984, he and Gabossi had a heated discussion concerning disability payments to maintenance foreman Cordova. Tr. 468-69. Upadhyay testified that Gabossi "got real hot, upset, and left the office." Tr. 469. Upadhyay further testified that it was then that he decided to fire Gabossi. Id.

On October 1, 1984, Gabossi told Upadhyay that he no longer wanted to be in charge of the mine when Upadhyay was away. Tr. 493. Also, during the first week of October 1984, Upadhyay traveled to Washington, D.C. to meet with his supervisor Lloyd Ernst. Upadhyay delivered to Ernst a handwritten memorandum requesting Ernst's permission to fire Gabossi. Tr. 469-70. Although Upadhyay stated in the memorandum that Gabossi is a "good miner, [who] takes his work very seriously and gets 100% work out of his employees", Upadhyay also stated that Gabossi "can't work with others," that Gabossi is "very intimidating and tries to get his way in everything," that he "creates problem[s] with the union employees," and that his loyalty to Western Fuels is "nil or negative." Exh. R-5. Upadhyay testified that although he recommended that Gabossi be fired, Ernst chose Upadhyay's alternative suggestion that Gabossi be assigned more hours underground in the hope that he would become frustrated with his job and quit. This plan was set in motion upon Upadhyay's return to the Deserado Mine. Tr. 471, Exh. R-5.

On November 6, 1984, Gabossi telephoned Boyd Emmons, District Coal Mine Inspector for the State of Colorado, Division of Mines. Tr. 27. Both Gabossi and Inspector Emmons testified that during their November 6 conversation, Gabossi expressed his concern about mine safety as a result of the underground reporting structure at the Deserado Mine. Gabossi also told Emmons that he was concerned about losing his state foreman certification should an accident occur underground because of the reporting system. Emmons' response was that as mine foreman Gabossi was responsible under section 34-24-101 of the Colorado Revised Statutes for all underground operations. Tr. 92. 2/ Although Gabossi did not

2/ Section 34-24-101(2) of the Colorado Revised Statutes provides:

The mine foreman shall have full charge of all inside workings and of all persons employed therein, in order that all the provisions of articles 20 to 30 of this title, insofar as they relate to his duties, shall be complied with, and so that the regulations prescribed for each class of workmen under his charge shall be carried out in the

file a written safety complaint with the state Division of Mines, he did ask Inspector Emmons to send him a letter setting forth his responsibilities as mine foreman under Colorado state law. Tr. 27-29, 92-96.

The November 9th Incident

On Friday, November 9, 1984, Gabossi showed mine manager Upadhyay the letter that he had received from Inspector Emmons relating to his mine foreman duties under state law. Gabossi testified that he presented the letter to Upadhyay after Upadhyay had given him the additional responsibility of supervising an underground computer technician, as well as placing him in charge of surface belts running from the mine to the silos. Tr. 30. Gabossi stated that as soon as Upadhyay read Emmons' letter, Upadhyay "instantly got mad and told me that if I didn't like it, to quit...." Gabossi added that it was "quite a heated discussion." Tr. 31.

Upadhyay agreed with Gabossi that the November 9 incident was a "big blowup" but testified that he was not presented with Inspector Emmons' letter until after Gabossi had asked whether Western Fuels intended to keep its promise to buy his house were he to leave the company, and after Gabossi had called him the "worst mine manager" for whom he had ever worked and had told him that he belonged in a "caste system." Upadhyay added that, in any event, the letter from the Colorado Division of Mines merely recited the relevant Colorado state law that he and Gabossi had previously discussed. Tr. 472-74.

Gabossi's Probation and Discharge

Upadhyay testified that on Sunday, November 11, 1984, he called his supervisor, Lloyd Ernst, and again asked Ernst's permission to fire Gabossi. Ernst suggested that Gabossi be placed on probation. The next day, Upadhyay orally informed Gabossi that he was being placed on probation indefinitely. The primary reason given by Upadhyay for this action was Gabossi's inability to get along with other members of the management team. Tr. 475-76. While Gabossi admitted that Upadhyay told him that he was being placed on probation for not getting along with other senior staff members, Gabossi also stated that Upadhyay was "madder than hell" that he had contacted the Colorado Division of Mines. Tr. 32, 34. Gabossi received his letter of probation on November 16, 1984. The letter read, in pertinent part:

Your willingness to work harmoniously under the organization structure put into effect by Western Fuels has been negative. You have repeatedly objected to the idea of Maintenance Superintendent being responsible for underground maintenance.

You have demonstrated your inability to work

strictest manner possible.

Exh. C-1.

harmoniously with other division heads and employees at the Deserado Mine.

Exh. C-3.

Gabossi testified that from November 12 to January 21, 1985, Upadhyay was "very cool, but civil" to him. Tr. 42. On January 21 (just 9 days before he was fired) Gabossi reported to Upadhyay that one of maintenance superintendent Beasley's crew was falsifying permissibility inspection logs. Id. Gabossi further testified that he had little communication with Upadhyay from January 21 to January 30, 1985, when he was discharged. Tr. 42-43.

Upadhyay testified that he had decided once again to seek permission from upper management to fire Gabossi after being informed on January 29, 1985, by maintenance superintendent Beasley that Beasley was leaving Western Fuels in part because of his inability to work with Gabossi. Tr. 485. Upadhyay additionally testified that inasmuch as he had lost maintenance superintendent Burnett and was about to lose Beasley because of Gabossi's poor attitude, he decided to seek Gabossi's termination to prevent his also losing the next maintenance superintendent. Tr. 486. Upadhyay then contacted senior management in Washington, D.C. and received permission from Ken Holum, the company's General Manager, to fire Gabossi. Id.

Gabossi and Upadhyay had another "heated argument" when Gabossi was given his termination notice on January 30, 1985. The termination notice reads in part:

Western Fuels-Utah, Inc. at the Deserado Mine needs to have employees who can act together as a team, especially now in view of our small workforce. Your efforts have not been directed towards that end. For this reason, your employment shall be terminated at Western Fuels-Utah, Inc. effective immediately.

Exh. C-2.

II.

Following Gabossi's discharge, the Secretary filed a discrimination complaint on his behalf with this independent Commission. The administrative law judge held in favor of Western Fuels and dismissed Gabossi's complaint. We granted the Secretary's petition for discretionary review of the judge's decision.

The judge below concluded that Gabossi had complained to Western Fuels management about the underground reporting structure because of his concerns over safety. 9 FMSHRC at 1504. The judge also concluded that Gabossi "was fired because of his continuing and extensive conflict with mine management over the company's failure to coordinate

underground mining activities." Id. Nevertheless, despite acknowledging that Gabossi's complaints concerning the company's underground reporting structure were "safety related," the judge held that those complaints were not protected under the Mine Act. 9 FMSHRC at 1505. The judge states that, "In short, [Cabossi's] unprotected activity, insofar as the federal Act is concerned, was his continual clash with management over the reporting structure." Id. The judge found that Gabossi's complaints were unprotected because neither the Mine Act nor the Department of Labor's Mine Safety and Health Administration's regulations contain a provision on a mine foreman's duties corresponding to section 32-24-101(2) of the Colorado Revised Statutes. 9 FMSHRC at 1505. See n. 2, supra. 3/

We hold that the judge erred in concluding that Gabossi's complaints to mine management regarding the Deserado Mine's underground reporting structure did not constitute activity protected under the Mine Act. In that regard, we note that the record amply supports the judge's determination that Cabossi's complaints to Western Fuels about the underground reporting structure were safety related. Cabossi testified that he had complained to Upadhyay about 10 to 15 times concerning the underground coordination problems between the production and the maintenance departments, but was told that maintenance was "none of his business." Tr. 22, 25-26, 143, 182. Cabossi was particularly concerned about ventilation changes made by the maintenance department which he believed could jeopardize the safety of the production crew. Tr. 21-22, 179-80.

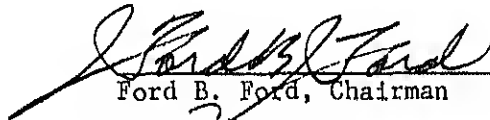
Section 105(c)(1) of the Mine Act specifically prohibits discrimination against a miner who has "made a complaint under or related to this Act, including a complaint notifying the operator ... of an alleged danger or safety and health violation." 30 U.S.C. § 815(c)(1) (emphasis added). The fact that Gabossi's safety concerns may have been related to the Colorado statute does not make his objections regarding the Deserado Mine's underground reporting structure any less a safety complaint under the Mine Act.

In light of our finding that Gabossi's complaints to mine management were protected under the Mine Act and in light of the judge's conclusion that Gabossi was fired because of his "continuing and extensive conflict with mine management over the company's failure to coordinate underground mining activities," the Secretary may have established a case of unlawful discrimination. Secretary on behalf of David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Thomas Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). It remains to be determined whether, on the basis of this record, Western Fuels successfully rebutted the Secretary's case or

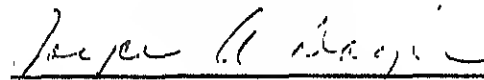
3/ The judge, however, did find that Cabossi's contacting the Colorado Division of Mines and his presentation of State Inspector Emmons' letter to mine manager Upadhyay constituted activity protected under the Mine Act. 9 FMSHRC at 1505.

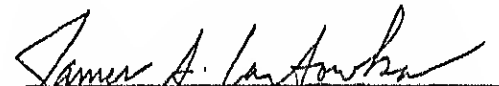
affirmatively defended against it. Pasula, supra; Robinette, supra. See also, Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987); Donovan v. Stafford Construction Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983). Accordingly, we remand this case for the judge to make additional findings of fact and to analyze those findings in accordance with applicable case law. Furthermore, to the extent appropriate for the disposition of this case, on remand the judge should consider the November 9, 1985 incident involving Gabossi and mine manager Upadhyay, Gabossi being placed on probation subsequently, and the events surrounding the discharge of Gabossi on January 30, 1985.

For the reasons set forth above, the judge's decision is reversed, the complaint of discrimination is reinstated, and the case is remanded for further proceedings consistent with this decision.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doylo, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 19, 1988

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) :
 :
v. : Docket No. CENT 88-53-M
 :
EL PASO SAND PRODUCTS, INC. :

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

ORDER

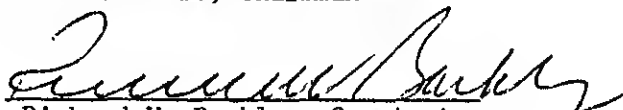
BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). On July 11, 1988, Chief Administrative Law Judge Paul Merlin issued an Order of Default finding respondent El Paso Sand Products, Inc. ("El Paso"), in default for failure to answer the Secretary of Labor's civil penalty complaint and the judge's subsequent order to show cause and assessing a civil penalty of \$345 proposed by the Secretary. By letter dated July 19, 1988, addressed to Judge Merlin, El Paso asserted that it had previously responded in writing to the Secretary's civil penalty complaint and, apparently, the show cause order as well. Copies of these responses, attached to the July 19 letter, reflect that they were sent to the Secretary of Labor's Dallas, Texas, Solicitor's Office rather than to this independent Commission. We deem El Paso's July 19 letter to constitute a timely petition for discretionary review of the judge's default order. See, e.g., Mohave Concrete & Materials, Inc., 8 FMSHRC 1646 (November 1986). We grant the petition and summarily remand this matter to the Judge for further proceedings.

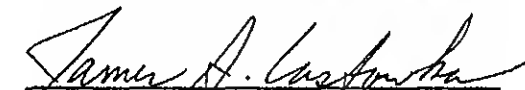
It appears from the record that El Paso, acting pro se, attempted to file timely written responses to the Secretary's civil penalty complaint and the judge's show cause order. Although these documents were apparently sent to the Secretary's Solicitor's Office and were not filed with the Commission, as required, El Paso may have been attempting, in good faith, to comply with its filing responsibilities -- a factor that may justify relief from default. See, e.g., Upright Mining, Inc., 9 FMSHRC 206, 207 (February 1987). Under these circumstances, we conclude that El Paso should be afforded the opportunity to explain its filing attempts to the judge, who shall determine whether relief from default is appropriate. Cf. Kelley Trucking Co., 8 FMSHRC 1867, 1869 (December 1986).

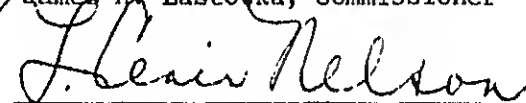
For the foregoing reasons, the judge's default order is vacated and this matter is remanded for proceedings consistent with this order. El Paso's attention is directed to the requirements that all further pleadings and papers in this proceeding must be filed with the Commission and copies of all such documents served on the Secretary of Labor. 29 C.F.R. §§ 2700.5(b) & .7. 1/


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

1/ Commission Procedural Rule 5(b) states:

Where to file. Until a Judge has been assigned to a case, all documents shall be filed with the Commission. After a Judge has been assigned, and before he issues a decision, documents shall be filed with the Judge, except for documents filed in connection with interlocutory review, which shall be filed with the Commission. After the Judge has issued his decision, documents shall be filed with the Commission. Documents filed with the Commission shall be addressed to the Executive Director and mailed or delivered to the Docket Office, Federal Mine Safety and Health Review Commission, 1730 K Street, N.W., Sixth Floor, Washington, D.C. 20006.

29 C.F.R. § 2700.5(b).

Distribution

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 19, 1988

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. WEVA 86-190-R
	:	WEVA 86-194-R
SOUTHERN OHIO COAL COMPANY	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	WEVA 86-254
	:	
SOUTHERN OHIO COAL COMPANY	:	
	:	

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson,
Commissioners

DECISION

BY THE COMMISSION:

At issue in this consolidated contest and civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982) ("Mine Act" or "Act"), is the validity of a notice to provide safeguard issued to Southern Ohio Coal Company ("Socco") pursuant to 30 C.F.R. § 75.1403. 1/ Commission Administrative Law Judge

1/ 30 C.F.R. § 75.1403 repeats section 314(b) of the Mine Act, 30 U.S.C. § 874(b), and states:

Other safeguards adequate, in the judgment of an authorized representative of the Secretary [of Labor], to minimize hazards with respect to transportation of men and materials shall be provided.

The procedures for issuing safeguards and citations for failure to maintain required safeguards are described in 30 C.F.R. § 75.1403-1(b):

The authorized representative of the Secretary shall in writing advise the operator of a specific

Roy J. Maurer concluded that because the safeguard in question contained a requirement that was "of a general nature applicable to at least a significant number of other [underground] coal mines," rather than a requirement specifically applicable to Socco's mine, it was invalid. 9 FMSHRC 273, 278 (February 1987) (ALJ). Accordingly, he vacated a withdrawal order issued to Socco that alleged a violation of the safeguard. On review, the parties dispute whether the general applicability of a safeguard requirement is a proper basis for invalidating a notice to provide safeguards. We do not reach this question of law because, in any event, substantial evidence of record does not support the judge's conclusion that the challenged safeguard was a generally applicable requirement rather than a mine-specific requirement. On this basis, we reverse.

On November 3, 1982, during an inspection of Socco's Martinka No. 1 underground coal mine, an inspector of the Department of Labor's Federal Mine Safety and Health Administration ("MSHA") issued to Socco a notice to provide safeguard which stated:

24 inches of clearance is not being provided on both sides of the feeder for the north main (122) section coal conveyor belt, in that only 15 inches is provided along one side.

24 inches of clearance shall be provided on both sides of the coal feeders in this mine.

Gov. Ex. 2. 2/

On February 19, 1986, another MSHA inspector issued to Socco a withdrawal order pursuant to section 104(d)(2) of the Mine Act, 30 U.S.C. § 814(d)(2), alleging a violation of the above safeguard and, hence, of section 75.1403. The withdrawal order stated:

safeguard which is required pursuant to § 75.1403 and shall fix a time in which the operator shall provide and thereafter maintain such safeguard. If the safeguard is not provided within the time fixed and if it is not maintained thereafter, a [citation] shall be issued to the operator pursuant to section 10[5] of the Act.

30 C.F.R. § 75.1403-1(a) states that safeguards will be required "on a mine-by-mine basis." 30 C.F.R. §§ 75.1403-2 through 75.1403-11 set forth specific "criteria" by which authorized representatives of the Secretary are to be guided in requiring safeguards. Section 75.1403-1(a) further states that "[o]ther safeguards may be required." See generally Southern Ohio Coal Co., 7 FMSHRC 509 (April 1985).

2/ A "feeder" is part of a coal-carrying conveyor system and is described as a "structure for delivering coal ... at a controllable rate." Bureau of Mines, U.S. Department of the Interior, Dictionary of Mining, Mineral, and Related Terms 417 (1968).

In the 2 east C section, there was less than 24 inch clearance between the left coal line rib and the Stamler belt coal feeder for approximately 6 to 7 feet, only 12 inch clearance was between the Stamler and ribline and the start and stop switch was installed for the belt conveyor in this area. Coal & slate was being dump[ed] on the right side of the Stamler instead of the front and the fire warning box was installed outby the Stamler Feeder. Mechanics, electricians and belt cleaners use this area. ... Safeguard No. 2034480 - issued 11-03-82.

Gov. Ex. 1. The withdrawal order included findings that the violation of the safeguard notice and section 75.1403 was the result of Socco's unwarrantable failure to comply therewith (Tr. 21), and that the violation significantly and substantially contributed to the cause and effect of a mine safety hazard. Gov. Ex. 1; 30 U.S.C. § 814(d). Socco contested the order of withdrawal and the Secretary's proposed civil penalty for the alleged violation of section 75.1403, asserting that the alleged violation did not occur. Socco also challenged the inspector's significant and substantial and unwarrantable failure findings.

Before the administrative law judge, the Secretary's witnesses testified without contradiction that only a 12-inch clearance existed between the coal feeder and the left ribline at the time the inspector cited Socco for violating the requirement of the notice to provide safeguard that a 24-inch clearance be maintained. The testimony at the hearing focused upon the reasons for the lack of clearance and the Secretary's allegations that the violation of the safeguard significantly and substantially contributed to a mine safety hazard and resulted from Socco's unwarrantable failure to comply with the safeguard's requirement. No evidence was introduced addressing the circumstances under which the underlying 1982 notice to provide safeguard had been issued or the specific reasons why the requirement of the safeguard had been imposed at the Martinka No. 1 mine. In its post-hearing brief, however, Socco argued, among other things, that a notice to provide safeguards cannot properly address hazards that are of a more universal nature generally present in the underground coal mining industry rather than being mine specific.

The judge agreed. Pointing analogously to the principles enunciated in Zeigler Coal Co. v. Kleppe, 536 F.2d 398, 407 (D.C. Cir. 1976), the judge stated that the Secretary's imposition of generally applicable safeguard requirements could amount to improper circumvention of the statutory rulemaking process. 9 FMSHRC at 277-78. The judge further stated:

Reading the record as a whole ... a clear inference may be drawn that the requirements of the ... safeguard ... [for 24 inches of clearance on both sides of the mine's coal feeders] are applicable to at least a significant number of coal mines which employ coal feeders and shuttle cars to transport coal. Importantly, there is no reason given in

th[e] record why the 24 inch clearance requirement should be imposed only in the particular mine herein involved and not in mines using coal feeders generally.

9 FMSHRC at 277 (emphasis in original). The judge concluded that the requirement of the safeguard properly should have been promulgated pursuant to the rulemaking procedures of section 101 of the Mine Act, 30 U.S.C. § 811, rather than imposed on Socco pursuant to a safeguard notice. *Id.* Therefore, he held that the notice to provide safeguard was invalid and he vacated the contested withdrawal order based thereon. We granted the Secretary's petition for discretionary review.

On review the Secretary asserts that the judge erred in invalidating the safeguard on the basis of his inference that the safeguard's requirement of 24 inches of clearance between the rib and the feeder is of a general nature applicable to a significant number of underground coal mines utilizing coal feeders. The Secretary also argues that the Mine Act does not mandate that a safeguard be mine-specific. According to the Secretary, it is enough if the transportation hazard addressed by the safeguard is not addressed by a generally applicable mandatory standard. Sec. Reply Br. at 5-6. Alternatively, the Secretary asserts that substantial evidence does not support the judge's conclusion that the requirement of the safeguard at issue was applicable to at least a significant number of mines using coal feeders.

Socco responds that the judge correctly held the safeguard to be invalid. Socco asserts that the intent of the statutory safeguard provision is to allow the Secretary to require an operator to address certain transportation hazards caused by peculiar conditions at a mine, not to address conditions common to a significant number of mines. Socco argues that the judge properly recognized that the requirement imposed by the safeguard at issue is generally applicable to a significant number of underground coal mines and therefore that its clearance requirement should have been promulgated through the Mine Act's rulemaking procedures.

The Commission has previously had occasion to examine the Act's safeguard provision. The Commission has noted that the broad language of the provision "manifests a legislative purpose to guard against all hazards attendant upon haulage and transportation in coal mining." Jim Walter Resources, Inc., 7 FMSHRC 493, 496 (April 1985). The Commission has observed that while other mandatory safety and health standards are adopted through the notice and comment rulemaking procedures set forth in section 101 of the Act, section 314(b) extends to the Secretary an unusually broad grant of regulatory power -- authority to create what are, in effect, mandatory safety standards on a mine-by-mine basis without regard to the normal statutory rulemaking procedures. Southern Ohio Coal Co., *supra*, 7 FMSHRC at 512. The Commission also has recognized that the exercise of this unique authority must be bounded by a rule of interpretation more restrained than that accorded promulgated standards. Therefore, the Commission has held that a narrow construction of the terms of a safeguard and its intended reach is

required and that a safeguard notice must identify with specificity the nature of the hazard at which it is directed and the remedial conduct required by the operator to remedy such hazard. Id.

These underlying interpretive principles strike an appropriate balance between the Secretary's authority to require safeguards and the operator's right to notice of the conduct required of him. They do not, however, resolve the important issue raised here for the first time -- whether a notice to provide safeguard can properly be issued to address a transportation hazard of a general rather than mine-specific nature. The United States Court of Appeals for the District of Columbia Circuit, in the context of the Mine Act's provision for mine-specific ventilation plans, has recognized that proof that ventilation requirements are generally applicable, rather than mine-specific, may provide the basis for a defense with respect to alleged violations of mandatory ventilation plans. In Zeigler Coal Co., *supra*, the court considered the relationship of a mine's ventilation plan required under section 303(o) of the Act, 30 U.S.C. § 863(o), to mandatory health and safety standards promulgated by the Secretary. The court explained that the provisions of such a plan cannot "be used to impose general requirements of a variety well-suited to all or nearly all coal mines" but that as long as the provisions "are limited to conditions and requirements made necessary by peculiar circumstances of individual mines, they will not infringe on subject matter which could have been readily dealt with in mandatory standards of universal application." 536 F.2d at 407; See also Carbon County Coal Co., 6 FMSHRC 1123, 1127 (May 1984) (Carbon County I); Carbon County Coal Co., 7 FMSHRC 1367, 1370-72 (September 1985) (Carbon County II).

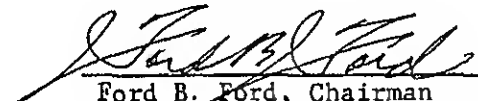
Whether, as the judge believed, a similar type of challenge may be made to a safeguard notice is a question of significant import under the Mine Act. Given the manner in which this important question was raised and addressed in the present case, and the nature of the evidence in this record, it is a question that we do not resolve at this time.

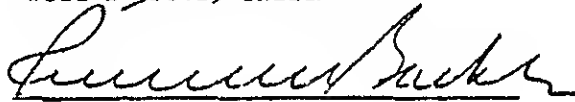
In the present case Socco did not assert its right to challenge the validity of the safeguard notice based on the safeguard's asserted general applicability until the submission of its post-hearing brief to the judge. Thus, at the hearing Socco did not offer any evidence in support of this contention. Thus, even if we were to hold that an operator may challenge a notice of safeguard on the ground that it seeks to impose a requirement of a general nature applicable to all or a significant number of mines, the record at hand contains no evidence that this is the case here. Rather, the testimony of the witnesses focused on the cause of the February 19, 1986, violation of the notice to provide safeguard, whether the violation was significant and substantial, and whether the violation resulted from Socco's unwarrantable failure to comply with the safeguard.

The record contains no evidence concerning the quite distinct issue of the general or mine-specific nature of the safeguard requirement. No testimony was offered and no documents were introduced regarding the circumstances under which the underlying safeguard was issued, the existence of or need for similar safeguards at other mines,

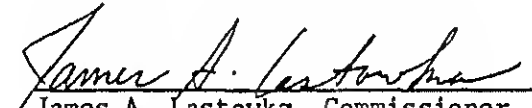
or any general MSHA policy regarding uniform clearance requirements around coal feeders. We note particularly that Socco failed to introduce any evidence as to whether the same or a similar safeguard had been issued at any of its other mines. Compare Carbon County II, 7 FMSHRC at 1372-75. There is no factual basis in this record supporting the judge's inference that the clearance requirement of the challenged safeguard is applicable to at least a significant number of other mines employing coal feeders and shuttle cars to transport coal. In failing to introduce any evidence supporting its contention, Socco failed to support its challenge to the safeguard.

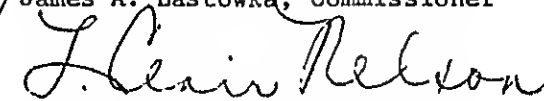
Therefore, substantial evidence of record does not support the judge's conclusion that the notice to provide safeguard was issued improperly. The judge's vacation of the contested order of withdrawal is reversed. This matter is remanded to the judge for consideration of Socco's contest of the Secretary's findings that the violation was significant and substantial and resulted from the operator's unwarrantable failure to comply with the notice of safeguard and for the assessment of an appropriate civil penalty.


Ford B. Ford, Chairman


Richard V. Backley, Commissioner


Joyce A. Doyle, Commissioner


James A. Lastowka, Commissioner


L. Clair Nelson, Commissioner

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

JUN 30 1988

WESTERN FUELS-UTAH, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 87-166-R
v.	:	Order No. 2835325; 3/21/87
	:	
SECRETARY OF LABOR,	:	Docket No. WEST 87-167-R
MINE SAFETY AND HEALTH	:	Citation No. 2835326; 3/22/87
ADMINISTRATION (MSHA),	:	
Respondent	:	Docket No. WEST 87-168-R
	:	Citation No. 2835327; 3/22/87
	:	
	:	Docket No. WEST 87-169-R
	:	Citation No. 2835328; 3/22/87
	:	Mine I.D. 05-03505
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 87-251
Petitioner	:	A.C. No. 05-03505-03540
	:	
v.	:	Deserado Mine
	:	
WESTERN FUELS-UTAH, INC.,	:	
Respondent	:	

DECISION

Appearances: Karl F. Anuta, Esq., Boulder, Colorado,
for Contestant/Respondent;
Margaret A. Miller, Esq., Office of the Solicitor,
U.S. Department of Labor, Denver, Colorado,
for Respondent/Petitioner.

Before: Judge Lasher

The penalty case was consolidated with the four contest proceedings at hearing---which as reflected in the caption involve a Section 103(k) withdrawal order and 3 citations. The 5 dockets arise under and the Commission has jurisdiction pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. Section 801 et seq. (1982) (herein the Act).

The four enforcement papers (order and 3 citations) were issued by MSHA Inspector Dale L. Hollopeter subsequent to the occurrence of a serious accident which occurred at approximately 9:25 a.m., on March 20, 1987, near the Deserado mine, an underground coal mine operated by Contestant/Respondent (herein Western Fuels) in Rio Blanco County, Colorado.

One of the citations (No. 2835327) charged that the alleged violation described therein was "significant and substantial". The other 2 Citations (numbered 2835326 and 2835328) did not contain "S&S" designations.

A. General Findings

The Deserado Mine is an underground coal mine located near Rangely, Rio Blanco County, Colorado. Coal is taken from the mine to a preparation plant from which it is transported for several miles to a train loadout area by an overhead conveyor (T. 27, 55, 153).

The parties, in addition to stipulations as to jurisdiction, admissibility of underlying documentation and mandatory penalty assessment criteria, also submitted the following written stipulations:

- a. On Friday, March 20, 1987, at about 9:25 a.m., a non-fatal powered haulage accident occurred on the County Road 78 at the Beltline Conveyor Overpass (CNV-2). Dale J. Ackerman, truck/light equipment operator, and Michael G. Smith, heavy equipment operator, were seriously injured when the Euclid, RD-50, end dump haulage truck, with the bed raised, struck the overpass, causing the truck to overturn onto its left cab side. The accident occurred because the haul truck operator failed to lower the truck bed after dumping refuse material at Pit 2/3 1/
- b. The accident was reported by the (mine) operator to the MSHA office in Glenwood Springs at approximately 12:00 noon on March 20, 1987.
- c. The No. 2 Beltline conveyor overpass is above County Road No. 78 and is used as a haul road by Western Fuels with express permission of Rio Blanco County and Bureau of Land Management.
- d. The No. 2 Beltline Conveyor overpass was not at the time of the accident marked and did not contain warning signals.

1/ The evidence of record also overwhelmingly established that the driver of the truck, Ackerman, for whatever reason, failed to lower the truck bed and then drove the truck approximately 2 miles from the pit to where the bed struck the overpass as the truck attempted to proceed underneath.

Inspector Hollopeter, who is stationed in Denver, was advised of the accident by his supervisor sometime after "noontime" on Friday, March 20, 1987. After packing, he drove from Denver to Craig, Colorado that afternoon. That night he prepared his equipment, etc. for the ensuing investigation, and the following morning traveled from Craig to the mine where he met with company and union officials at approximately 8 a.m. (T. 28-32). He was advised by Mine Superintendent John Trygstad that the haulage truck--with the bed thereof in the raised position--had struck the overland conveyor structure. At the conclusion of the meeting, Inspector Hollopeter issued the Section 103(k) Order-- based on what he was told at the meeting-- to insure the safety of the miners (T. 33-38, 55). Following the meeting, Inspector Hollopeter, accompanied by Western Fuels' Safety Director Jerry Kowllok, went to the accident scene, and then to Pit 2-3, i.e. the refuse pile (T. 40, 59).

It was Inspector Hollopeter's understanding, and I so find from the entire record, that Dale Ackerman, the driver of the 50-ton capacity truck on the trip in question, his second of the day (T. 132), started out from the preparation plant on March 20 with a load of refuse, proceeded down the 2-lane haul road (County Road 78) to the refuse pile (pit) where he dumped the refuse material, picked up passenger Smith, and was traveling back down the gravel-dirt haul road to the preparation plant when the accident occurred as above noted about 9:25 a.m. at a point about 1.75 miles from the pit (T. 41, 44-48, 132, 256-257). The speed limit on the haul road from the refuse pit (dump) is 30 m.p.h. (T. 256).

The accident occurred when the right side of the front of the "headache rack" (a protective part of the bed extending out over the cab to keep falling objects from striking the cab and the truck operator) struck the overpass structure (T. 60-61, 71, 362; Exs. M-11, 12 and 13).

The truck ended up on its left side following the accident; Michael G. Smith, an "authorized" passenger (T. 243, 260, 294, 295) was removed from the truck at 10:40 a.m. and Ackerman, whose lower left leg had to be amputated at the scene, was removed from the truck at 12 noon (T. 52-53, 116; Ex. M-14).

After his arrival at the accident scene (and the refuse pit), Inspector Hollopeter took various measurements and photographs of the truck, overpass structure, and accident scene (Ex. M-6 through M-13) (T. 41, 50-58).

The overpass structure (sometimes referred to as an overhead conveyor) extends over the haul road in an arch, the lowest point of which is 20.16 feet and highest point being 27 feet; there was a clearance of approximately 26 feet at the point where the truck struck it (T. 65, 68, 138, 141). The conveyor is in the center

of the structure itself with walkways on either side. One effect of the withdrawal order was to prohibit persons from walking on these walkways (T. 78). When the bed of the truck is raised it extends upward at a 60 degree angle and is about 28 feet 4 inches in height. The truck thus failed to clear the overpass by about 18-24 inches (T. 69). With the bed raised, there was thus no place the truck could have cleared the overpass (T. 70). In its travel position, i.e., with the bed lowered, the height of the truck is 14 feet 5 inches (T. 72).

B. Docket No. WEST 87-166-R

Validity of Withdrawal Order No. 2835325

The Order was issued pursuant to Section 103(k) of the Act which provides:

"In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal."

Subsequent to its issuance at 8:50 a.m. on March 21, 1987, the Order was modified four times by Inspector Hollopeter.

Western Fuels contends that the Order as modified, was improperly issued since its purpose was not to insure the safety of persons in the mine, but rather was intended to preserve evidence (T. 202). The Order itself charges no violation and MSHA seeks no penalty in connection therewith (T. 9).

The "Condition or Practice" involved in the Withdrawal Order was set forth by Inspector Hollopeter in Section 8 thereof as follows:

The mine has experienced a nonfatal powered haulage accident on the surface haul road (County Rd. 78) at No. 2 Beltline Conveyor overpass. This order is issued to assure the safety of persons until an examination or investigation is made to determine the area is safe. An investigation party of company officials, state and county officials, safety committeemen are permitted to enter the area.

Section 15 of the Withdrawal Order, wherein the "Area or Equipment" to be withdrawn is to be described, was filled in by Inspector Hollopeter as follows:

"The No. 2 Beltline Conveyor overpass structure 150 feet each side of the haul road and the haul road 150 feet easterly and westerly of the structure, except the southern portion of the haul road to permit traffic to pass."

Inspector Hollopeter issued the Order to ensure the safety of persons until an investigation could be conducted (T. 34-36, 142).

At 1:40 p.m. on March 21, 1987, the Inspector issued the following modification:

103(k) Order is modified to allow the operator to move the Euclid R-50 (Company No. 4) from the accident area to the shop area. Also, the closure of a section of this haul road is now removed from this order.

At 7:35 p.m. on March 21, 1987, this second modification 2/ was issued:

The 103(k) Order is modified to show the area of the No. 2 Beltline Conveyor (overland conveyor) closure from the 150 feet on each of the haul road changed to just the No. 2 Beltline Conveyor Overpass structure and belt at the main supports north of the haul road to the main supports south of the haul road.

At 11:39 a.m. on March 22, 1987, this third and final modification was issued by Inspector Hollopeter:

The 103(k) Order is modified to allow repairs to the No. 2 beltline conveyor overpass and operation of the conveyor belt this being based on the Chief Engineer opinion which was given and to allow repairs on the Euclid R-50 (Company No. 4) haulage truck, with stipulation that the District Office, MSHA, CSMH&H, Denver, Co., be notified of any defective item found and that we get a report of the damage and repairs done to the truck.

If an independent shop is to do the repairs, we are to be notified so that we might be present during examination or testing.

One effect of the Withdrawal Order, as previously noted was to prohibit persons from walking on the walkways alongside the conveyor. The operation of the conveyor was also "closed" by the

2/ Upon the issuance of this second modification, the coverage of the Order would have remained on the "curved arched portion of the overpass structure", the truck, and the conveyor belt (T. 153).

order (T. 85, 86). The order did not prevent traffic on the haulage road (County Road 78) from traveling under the overpass structure, and thus would not have the effect of preventing the same kind of accident from happening had another Euclid truck proceeded under the overpass with its bed raised (T. 80-85). This is a moot point, however, since there was only one such truck operating at the time-- the one involved in the subject accident (T. 87). The Inspector testified he also put an order on the truck to "prevent people from being in or around" it (T. 87-88) although this is not specifically reflected in Section 15 (Area or Equipment) of the order itself.

At the time of his initial investigation, Inspector Hollopeter did not know the truck was being driven-- why/or what caused the truck to be driven-- with the bed in a raised position (T. 73, 77). He considered the possibility that there was a malfunction which would have caused the bed to be in a raised position (T. 77, 151).

Inspector Hollopeter issued the first modification of the Withdrawal Order because the County wanted the truck moved and so that the truck could be moved off the road to the shop area allowing traffic to move in both directions (T. 151). At the time of its issuance he had not checked out and cleared the overpass structure for safety (T. 74-76, 142, 189). He described his concerns relating to the overpass as follows:

"Just underneath, looking at the conveyor, I saw where -- the side which the truck had contacted, initially, and -- at the initial contact point, I saw, on the lattice work, where there was (sic) braces broken out, bent out. And, also, the I-beams were bent, twisted underneath it."
(T. 77)

The Inspector was also concerned about the cracking of paint around the bolts of the overpass which may have been caused by the accident (T. 147-149). 3/

Following issuance of the first modification which permitted removal of the damaged truck from the accident area, the Inspector again examined the conveyor structure. He testified as to what he observed:

"On the easterly side of the structure, which was the side, which the haulage truck had initially contacted, I saw

3/ Although not well articulated by the witness, I infer that this concern was directed toward the possible traumatic effect the impact of the collision had on the structure.

the lattice work bent, braces broken out completely on one end, and bent out. The metal, which was bent. For a distance along the bottom of the conveyor, I observed some of the I-beams going across underneath this structure, bent. Also, I notice on the opposite side of the impact area, paint which appeared to be cracked, which was apparently caused by the impact.

Q. But, it was on the opposite side of the conveyor?

A. Yes." (T. 89)

Surface Area Foreman Jack L. Monfrada described what he saw when he arrived as follows:

"There was some beams and lattice work that was -- one lattice work was broke and pokin' up on the air, and you could see where these beams had been bent. They were horizontal beams, across the bottom of the structure.
(T. 342)

After this visual examination and conducting interviews (T. 89-91) Inspector Hollopeter issued the second modification at 7:35 p.m. on March 21, 1987. He explained what led to issuance of the second modification:

"Mainly, my understanding was that the company were (sic) havin' security people stay at that area to prevent people from goin' in the accident area -- or, under the 103K Order area. And, they'd have to keep people -- they said they was going to keep people there all the time. And, at that particular time, I didn't feel the Order should be lifted, because I had concern on the structure, but I felt the Order could be modified to bring the distances in from 150 feet just to -- just so the Order would pertain to the overland conveyor structure, that went across the road. And, that -- that way you wouldn't need to have a -- anyone secure the area, or -- as far as havin' a person there all the time."

(T. 90-91)

XXX

XXX

XXX

XXX

I was concerned about the amount of metal, which was damaged -- your braces, your I-beams, which were bent; the cracking of the paint, walkway, everything.

I was concerned about if the conveyor was operated, how much -- this metal was fatigued -- there could have been maybe an accident, shortly thereafter, if it was turned on. Just -- I had concern.

Q. And, concern about the safety of anyone who might walk up on that conveyor belt?

A. Yes.

(T. 92)

The third modification was issued at 11:34 a.m. on Sunday, March 22, 1987, to permit Western Fuels to repair the conveyor belt, it being the opinion of Western Fuels Chief Engineer Mike Weigand that upon completion of such the conveyor belt could be safely operated (T. 92-94). Inspector Hollopeter remained concerned about the safety of the structure and wanted MSHA "technical support people" to examine it. The third modification thus continued MSHA control over this aspect of the matter. By letter he requested them to examine it and subsequently received a written report back indicating the structure was safe which led to issuance of a fourth modification of the Order in May, 1987 (T. 93-96, 98) which removed the structure from the effect of the Order (T. 97). At this point only the truck remained under the control of the Order (T. 98). Following further investigation of the truck and the Inspector's receipt of information that the truck had no indications of defective parts, malfunction, etc., Inspector Hollopeter terminated the subject Section 103(k) withdrawal order (T. 98-100).

Michael J. Weigand, Western Fuels' Chief Engineer at the Deserado Mine, testified that when he inspected the overpass structure on the day of the accident he observed that one of the diagonal braces had broken loose and there was "some damage" to the ends of some I-beams which run "roughly parallel to the road" underneath the structure (T. 363). He felt that the photographs in the record as exhibits C-5, 10, 16 and 17 accurately depicted the damage to the structure immediately after the accident (T. 362-368). Mr. Weigand indicated that his inspection disclosed a 5-inch deflection of the structure the existence of which "was possible" before the accident (T. 371). He conceded that "there could be some effects from that accident" that could "weaken" the structure over the "longterm" (T. 373-374) and the relatively extensive repairs made to the structure after the accident were done because such were reimbursed by insurance, it took a shorter time to perform the repairs in that manner, and it was decided to do it "right" so that the structure would last its projected 30-year term (T. 374-376).

During the MSHA investigation in the 2-day period following the accident, Mr. Weigand participated and gave his opinion to Inspector Hollopeter that the structure "was safe" (T. 377-378). It was also his opinion that the structure was not a "dangerous overpass" either before or after the accident (T. 386).

On cross-examination, this exchange, of some significance, between Mr. Weigand and MSHA's counsel occurred:

Q. All right. And, you did tell Mr. Hollopeter, as I understand, that it was your opinion that there were some braces that should be replaced on this overpass?

A. I felt that if immediate work was done, that that's the part that should have been done, yes. (T. 392)

Mr. Weigand also conceded the possibility that the cracked paint on the structure occurred as a result of the truck's impact with it (T. 396).

Maintenance Superintendent Anthony Lauriski described the damage to the overpass structure as follows:

A. There was two trusses tore loose, and the hand rail was sort of bent in one spot, and there was some damage to the supports that go across and hold the walkway up (T. 410).

Western Fuels' Safety Instructor/Inspector David G. Casey, who in the beginning took charge of the rescue operation, described the damage to the structure this way:

"We had a couple of cross-beams that were tore loose- they were vertical beams, and a few I-beams that had been bent."
(T. 450)

Mr. Casey expressed the opinion that the overpass was not dangerous, perilous or risky either before or after the accident (T. 452, 461) for persons or vehicles to travel under or near (T. 461-462).

As to that part of the Order pertaining to the truck, Mr. Lauriski testified that he first "knew" there was no malfunction which would have caused the bed to raise (and thus cause the accident) when the valve was disassembled after the truck was taken to the repair shop (T. 419). This is supportive of the Inspector's judgment.

Although Western Fuels, in its Brief, repeats several times the charge that Inspector Hollopeter's issuance of the Section 103(K) Order was to "preserve evidence"- an allegedly unauthorized purpose, I find no direct or substantive support in the record, arguments or briefs for making such a finding. Inspector Hollopeter testified that he issued the subject order so that could "go in and look at the area to insure the safety of the miners" (T. 34). Scrutiny of the actions of the Inspector, from the time of his notification of the accident through his ensuing investigation and issuance of the Order and its three primary modifications, supports the contention of the Petitioner that "Throughout the course of the investigation, as Mr. Hollopeter learned more of the accident and investigated the

site, he was able to modify the order to keep in line with what he knew, while still ascertaining that no further injuries would occur." The nature of the possible hazards which the impact might have sustained to the structure (See Ex. C-2) and the possible problems with the truck which could have caused the bed to raise without operator negligence, all adequately evidenced in this record, would have made it irresponsible for the Inspector to have (1) proceeded without issuing the Order, or (2) to have terminated the Order prematurely. I find no support in the record for the proposition that the Order was issued either routinely or for the sole-or primary-purpose of preserving evidence pending a post-accident investigation. 4/

Western Fuels' contention (Brief, p. 22) that "The inspector used a club when a simple 'please' would have been sufficient," ignores the responsibility placed on the Inspector by the Mine Act to insure safety in such circumstances. 5/

There being no admissions or substantive or probative evidence upon which to conclude otherwise, it is found that the exercise of discretion by the Inspector in issuing the Order and its modifications was appropriate in the circumstances and that such Order and its modifications should be affirmed.

C. Docket No. WEST 87-167-R

Citation No. 2835326

The "Condition or Practice" deemed a violation by Inspector Hollopeter was described in Section 8 of the Citation as follows:

"The operator did not immediately contact the MSHA District or Subdistrict office having jurisdiction over its mine of an accident which had injuries to two miners which had reasonable potential to cause death. A non fatal powered haulage accident occurred on 3/20/87 about 9:25 a.m. in

4/ The Inspector, under Section 103(j) of the Act, certainly does have an independent obligation and responsibility to take appropriate measures "to prevent the destruction of any evidence which would assist in investigating the cause or causes" of an accident.

5/ The responsibility for determining structural damage to the overpass and conveyor, any truck malfunction, and any patent or latent safety hazards stemming therefrom, is recognized as a considerable one. Any question in the mind of the sole person bearing this burden in mine safety enforcement would necessarily be resolved on the side of safety.

which an Euclid R-50 (Co No. 4) End dump haulage truck contacted the No. 2 Beltline Conveyor overpass and the two miners in the cab were seriously injured. MSHA Glenwood Springs, CO. field office was notified of the accident 12 p.m. on 3/20/87."

The standard alleged to have been violated was, 30 C.F.R. 50.10 (entitled "Immediate Notification") which is placed in the codification system of the regulations under Subchapter M (entitled "Accidents, Injuries, Illnesses, Employment, and Production in Mines"), under Part 50 thereof (entitled "Notification, Investigation, Reports and Records of Accidents, Injuries, Illnesses, Employment and Coal Production in Mines") and lastly under Subpart B thereunder (entitled "Notification, Investigation, Preservation of Evidence"). Section 50.10 provides:

"If an accident occurs, an operator shall immediately contact the MSHA District or Subdistrict Office having jurisdiction over its mine. If an operator cannot contact the appropriate MSHA District or Subdistrict Office it shall immediately contact the MSHA Headquarters Office in Washington, D.C., by telephone, toll free at (202) 783-5582."

The issue posed by Western Fuels in connection with this Citation is:

"Does an operator violate the immediate reporting obligation of the regulations where he delays advising MSHA for 2 hours while devoting full attention to the rescue of injured miners, and where the delay does not exacerbate the rescue efforts or hinder the subsequent accident investigation?" 6/

It has been stipulated, and the record also reflects, that the accident occurred at 9:25 a.m. and that Western Fuels reported it to MSHA's Glenwood Springs Office at 12 noon (T. 107, 109, 448). This coincides with the 2 1/2 hour period of the

6/ It is initially noted that the questions whether the delay (1) exacerbated rescue efforts, or (2) hindered MSHA's investigation, would relate more directly to the penalty assessment factor of seriousness, rather than to the occurrence of an infraction of the standard cited. Obviously, at the time of delay in notification, the ultimate effects thereof may not be recognizable and the elements of proof inherent in the phraseology of the regulation contain no such exception for situations where there is no prejudicial effect. A roof-control requirement, for example, is not self-abrogating where the violation of such does not cause an injury - causing fall.

rescue operation (T. 111). Evidence of record (Ex M-5) indicates that passenger Mike Smith called in the accident on his two-way radio (hand-held pack-set) at approximately 9:23 a.m.

The first individual on the scene was a Coca-Cola delivery man. When he first arrived at the scene he thought no one was in the truck but upon investigation he saw and heard Mike Smith calling on the radio for help. When he heard no response to the first call for help, he got on Mike's radio and repeated the call for help. Immediately upon receiving the call that two miners were trapped in an overturned haul truck, the Western Fuels ambulance was dispatched and the Rangely District Hospital was notified at approximately 9:27 a.m. that their ambulance was also needed. The Rangely Rural Fire Protection District was also notified at this time. A Western Fuels Security Guard was dispatched immediately to the scene and arrived at 9:26 a.m. This security guard and the preparation plant foreman arrived in a Ford pickup (security vehicle).

Western Fuels' Safety Director at the time, Jerry Kowlok (T. 406), who did not testify, reported to Inspector Hollopeter that he contacted the Glenwood Springs office at about 12 noon and that he was "the only person designated to contact MSHA on an accident" (T. 109, 110, 339, 421, 447, 466-467). Mr. Kowlok did not make this report until after he had left the accident scene (T. 448, 459, 460). Mr. Kowlok had a radio at the scene of the accident, was in contact with his security base which had a telephone, and thus had the means by which to immediately notify MSHA of the accident (T. 335-336, 406, 429-430, 434, 459-460, 468-469).

Some of the general purposes of immediate notification are (1) determination of the type of accident, (2) getting the nearest available MSHA inspectors to the accident site, (3) allowing MSHA the opportunity to supply expertise to the situation as well as special equipment and special rescue teams, and (4) prevention of future accidents (T. 109-110). According to the Inspector, however, no such rescue teams, etc. were actually available for use in rescuing the two miners trapped in the truck in the instant situation (T. 176-180). On the other hand, MSHA was deprived of any opportunity to immediately investigate or be present at the accident site to assist in rescue or attempt to prevent further injuries. There was no allegation or evidence that notifying MSHA would have been a futile act i.e., that based on past inept performances by MSHA in accident situations, that Western Fuels was justified in believing a 2 1/2 hour delay would make no difference.

Further, there was no evidence presented that it was impossible- or even difficult- for Western Fuels to have notified MSHA immediately (T. 335-340, 341, 361, 406-408, 420, 428-432, 460, 466-468). There clearly was available the means of

communicating with MSHA and various management and other personnel available to do it. It is thus concluded that the violation as charged in the Citation occurred and that Western Fuels was negligent in the commission of such. The regulation infringed constitutes a highly important aspect of mine safety process and enforcement in terms of both accident investigation and assistance and is eroded only at considerable cost in the perspective of future accidents and tragedies. The importance of this regulation is related to the role Congress has mandated for inspectors in the Act itself (See Sections 103(j) and (k) thereof). Although the probability that the delay did not affect rescue or investigation processes, the humanitarian interests of Western Fuels' personnel, and the emotionally traumatic aspects of the incident itself are to be inferred from the record overall and stand in some mitigation of the considerable seriousness and culpability to be attributed to the violation, ^{7/} the \$20 penalty sought by the Secretary, being but a token sum, is not considered appropriate. A penalty of \$150.00 is assessed.

D. Docket No. WEST 87-168-R

Citation No. 2835327

The "Condition or Practice" charged to be a violation by Inspector Hollopeter was described in Section 8 of the Citation as follows:

"The equipment, Euclid R-50 (Co. No. 4) End dump haulage truck, being driven from the Pit 2-3 Refuse dump to the preparation plant was not secured in the travel position. A nonfatal powered haulage accident occurred, severely injuring the operator and passenger of the truck, when the raised truck bed struck the No. 2 Beltline Conveyor Overpass. Through interviews it was determined that it is the Company policy to have the bed of the truck lowered when traveling."

The standard allegedly violated was subsection (s) of 30 C.F.R. § 77.1607 pertaining to "Loading and Haulage Equipment; Operation", which provides:

7/ The parties, as part of their written stipulation (Court Ex. 1) concurred that Western Fuels is a large bituminous coal mine operator and that it proceeded in good faith in attempting to achieve rapid compliance after notification of all the alleged violations. As part of the same stipulation, the parties submitted into evidence a computerized history of prior violations (Ex. M-1) indicating that Western Fuels had 129 previous violations in the 2-year period preceding the issuance of the subject Citations.

"When moving between work areas, the equipment shall be secured in the travel position." ^{8/}

Inspector Hollopeter designated this to be a "significant and substantial" violation on the face of the Citation, giving rise to what appears to be the contention raised by Western Fuels: "Should an operator be charged with a significant and substantial violation where a driver, contrary to common sense, company policy, and specific operational instruction, operates a dump truck without lowering the bed" (Western Fuels Brief, p. 33). It is noted parenthetically at this juncture that the phraseology of this contention appears directed more to the mine safety concepts of "liability without fault" and mitigation of the penalty assessment criterion of negligence than to the "significant and substantial" formula.

I first find that it is a violation, whether or not a "significant and substantial" one. Thus, in reaffirming the strict liability or "liability without fault" doctrine's application in mine safety matters in Western Fuels-Utah, Inc., 10 FMSHRC 256 (March 25, 1988), the Commission pointed out that the principle of liability without fault requires a finding of liability even in instances where the violation results from unpreventable employee conduct. It thus rejected the notion of an exception to the rule even for unforeseeable employee misconduct. ^{9/} The parties have stipulated, and the record is clear, that the accident occurred because the truck operator failed to lower and secure the truck bed. The bed was raised when the accident occurred (T. 408, 418-419). The truck thus was not in "travel position" as the standard requires and Ackerman was driving the truck between work areas when the accident occurred. This constitutes a violation of the pertinent standard. For purposes of liability-- as distinguished from penalty assessment purposes-- a miner's negligence or misconduct is properly imputed to the mine operator. Secretary v. A.H. Smith Stone Company, 5 MSHRC 13 (1983). The question of negligence imputation for penalty purposes will be taken up subsequently herein.

In a recent decision Secretary v. Texasgulf, Inc., 10 FMSHRC (April, 1988) the Commission reaffirmed its position as to proof of significant and substantial violations:

^{8/} "Travel position" for the truck in question required the bed to be secured in its lowered position (T. 113, 242, 253-254). As noted in the Citation itself and established at the hearing, Western Fuels' policy required the truck, when moving, to have the bed in the lowered "travel" position (T. 112-115, 226-227, 310).

^{9/} I conclude elsewhere herein that the accident in question occurred as a result of Mr. Ackerman's unforeseeable negligence.

"Section 104(d)(1) of the Mine Act provides that a violation is significant and substantial if it is of "such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum, 3 FMSHRC 822, 825 (April 1981). In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984) the Commission explained:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary ... must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

The Commission has explained further that the third element of the Mathies formulation "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984) (emphasis deleted). We have emphasized that, in accordance with the language of section 104(d)(1), 30 U.S.C. § 814(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. Id. In addition, the evaluation of reasonable likelihood should be made in terms of "continued normal mining operations." U.S. Steel Mining Co., Inc., 6 FMSHRC 1574 (July 1984)."

In the circumstances of this case, the infraction of the safety standard was clearly established, as well as the fact that the violation contributed to the creation of a discrete safety hazard. Not only was there a reasonable likelihood that the hazard contributed to would result in an injury, but the hazard actually occurred, that is, it came to fruition when the raised truck bed struck the overpass structure, the direct result of which were the serious injuries to Ackerman and Smith (T. 115-118, 408; Ex. M-5). This is found to be a "significant and substantial" violation.

We turn now to the questions of negligence and mitigation. Mr. Ackerman was a full-time employee whose primary job was to

drive the Euclid R-50 haul truck and another haul truck whose dumping mechanism was similar to that of the Euclid. Ackerman would normally (at least since December, 1986) make 8-13 trips a day from the preparation plant to the refuse dump (T. 220-222, 286). Ackerman was familiar with the road-and by inference-the presence of and characteristics of the overpass he was to travel under (T. 283-286; See also "General Findings", supra).

Western Fuels established that in December, 1986, Mr. Ackerman had been trained in the operation of the Euclid R-50 truck by its Surface Area Foreman, Daniel J. Rideout (T. 216-218).

This training covered proper dumping procedures which Rideout described as follows:

"The proper dumping procedures would be to make sure your area -- where you're backing on up to --- that there's no obstructions or anything in the way, like that. Try to be on as level ground as possible, and set your dump bed; put your truck in neutral, sound the horn, dump your load; lower your bed; sound your horn, again; release your dump brake; put it in gear, and that's basically it; you're done."

(T. 220) (emphasis added)

Rideout described the Euclid R-50 as an "easy-to-drive", stable truck which had no tendency to tip over, and said there was no occasion on which it should be driven with the bed raised (T. 225-226). Rideout reiterated the company "policy" of not driving the truck with the bed raised and pointed out that such is set forth also in the "Operator Handbook" for the truck, Ex. C-7, at p. 33-35, (T. 227, 253, 293). Truck drivers were directed to keep a copy of the Handbook in the truck and to read it in their idle time (T. 228, 289). Rideout had never seen Ackerman driving with the bed up and would have disciplined him had he done so (T. 232-233). Rideout was certain that in meetings with his drivers, which I conclude would have included Mr. Ackerman, that the need for lowering the truck bed before traveling was discussed (T. 248, 258, See also T. 288). The drivers, however, were not specifically advised that the haul truck with the bed up would not clear the overpass, nor were they specifically advised what the height of the truck was with the bed raised (T. 258). Nor were they specifically advised what the clearance of the overpass was (T. 259). This was the only overpass the truck drivers would have occasion to drive under (T. 259).

The overpass was constructed in 1982 and would have been in existence throughout Mr. Ackerman's tenure as truck driver (T. 251).

At the time of the accident there was no sign or notice in the cab of the truck to remind the driver to lower the bed (T. 270) although such notice was apparently installed thereafter (T. 270, 323). There was an "indicator" (depicted in Exhibit C-11) which comes down in front of the truck's windshield from which the truck driver can determine if the bed was raised or lowered (T. 255-256, 262-263, 296).

Jack L. Munfrada, a Surface Area Foreman, described the bed indicator in the following examination sequence:

"Q. Is there any other way, when you're sitting in the driver's seat, or in the passenger's seat, that you can see that the bed is in the air?

A. Yes. There's a bed indicator on the bed of the truck. If the bed is lowered, it is in the right-hand corner, visually through the eight-inch window, and it is a round -- in diameter, approximately five inches, with a decal -- a red and white decal, with a black figure, pointing back towards the dump box. Also, you can see it through the driver's mirror, very plainly.

Q. You can see the bed through the driver's --

A. Yes. You could see it out the passenger door window -- you could see the headache rack. And, also, if the bed was up in the daytime, you'd notice the change in light." (T. 296-297). 10/

Based on its maintenance records and "Pre-shift Operator's Check Lists", Western Fuels had no indication to believe that the subject truck was not functioning properly in proximity to the accident (T. 402-406, 410-413) and in the absence of any other evidence to the contrary, and in light of the evidence indicating operator failure as the cause of the bed not being lowered to travel position, it is inferred and found that the truck was in proper operating condition at the time of the accident.

The record in this proceeding indicates that the cause of the accident was the operator's failure to lower the bed before proceeding on to the haul road and moving the vehicle to its point of impact with the overpass structure.

10/ From this dialogue as well as other evidence (T. 255-259) indicating other reasons why a truck driver would normally know or be aware of the raised bed, I find and infer that for a driver of the truck in question to proceed along the haul road with the truck bed raised and not have such fact enter the stream of his consciousness would be an unusual occurrence and one which would not be foreseeable by his foreman or other management (T. 471).

David G. Casey, Western Fuels' Safety Instructor, testified that he visited Mr. Ackerman in the hospital on the day of the accident and recounted this conversation concerning what had happened:

Q. And, did he explain to you what happened?

A. Yes. And -- and he said that he spaced it -- he couldn't believe that he'd spaced it out.

XXX XXX XXX

"The Witness: He couldn't believe that he'd spaced it out -- referring to the dump bed being up."

(T. 455-456)

When pressed to develop his understanding of Ackerman's use of the phrase "spaced out", Mr. Casey stated:

"The Witness: -- and he said "spaced out", and then we -- he said "I can't believe I f----- up", and he repeated it again, "I can't believe I did that", you know."

(T. 471)

From this and other evidence of record indicating Ackerman was a "good" employee who had received safety training (T. 439-445) it is concluded that the accident resulted from Mr. Ackerman's negligent oversight in not lowering the bed of the truck, and that such negligent conduct was not foreseeable by Western Fuels' responsible management personnel. Southern Ohio Coal Co., 4 FMSHRC 1459, at 1463-1464 (1982). In this connection, it is further noted that there is no evidence of prior accidents having occurred at the overpass (T. 465).

While a mine operator is not necessarily shielded from imputations of negligence even where non-supervisory employees such as Mr. Ackerman are concerned, A.H. Smith Stone Co., 5 FMSHRC 13 (1983), for the negligence of the miner to be attributed to the operator, consideration must be given the foreseeability of the miner's conduct, the risks involved, and the operator's supervision, training and discipline of its employees. Here, the record indicates that the mine operator fulfilled its obligations as to training and in the establishment of its policy as to not operating the truck with the bed raised. MSHA, in its brief does not contend (or discuss) imputation. Mr. Ackerman's negligence in the commission of the violation will not be imputed to Western Fuels, Southern Ohio Coal Co., supra, at 1465.

In view of the seriousness of this violation, and upon evaluation of the other general mandatory penalty assessment

factors previously discussed in connection with Citation No. 2835326, a penalty of \$300.00 is determined to be appropriate and assessed.

E. Docket No. WEST 87-169-R

Citation No. 2835328

The "Condition or Practice" deemed a violation by Inspector Hollopeter was described in Section 8 of the Citation as follows:

"The No. 2 Beltline Conveyor Overpass above the haul road (County Rd. No. 78) was not conspicuously marked or warning devices installed when necessary to insure the safety of the workers. A nonfatal powered haulage accident occurred when an Euclid R-50 End dump (Co. No. 4) raised bed contacted the overpass while traveling on the haulage road. The operator of the truck and passenger were severely injured. At the time of the investigation the overhead clearance was not marked.

The standard allegedly violated was Subsection (c) of 30 C.F.R. 77.1600 (entitled "Loading and haulage; General") which states:

"Where side or overhead clearances on any haulage road or at any loading or dumping location at the mine are hazardous to mine workers, such areas shall be conspicuously marked and warning devices shall be installed when necessary to insure the safety of the workers."

Although the Inspector originally charged that this was a "significant and substantial" violation, the Citation was subsequently modified to delete such designation upon further investigation (T. 158-160).

Western Fuels contends that the Conveyor (CNV-2) overpass was not "hazardous to mine workers" and thus warning signs (or devices) were not required.

Evidence in the record establishes that other than speed limit signs (T. 448) there were no signs, warnings, "clearance" signs or flashing lights on the overpass structure or conveyor (T. 118-121, 189-192, 245-246, 259, 463), or on the road on either side of the structure (T. 189, 448). Specifically, there was no sign on the overpass which said what the clearance was (T. 259). Inspector Hollopeter was of the opinion a hazard existed because there was no sign warning of the clearance of the overpass structure either on the structure itself or back along the haul road (T. 121-125).

There are no regulations applicable in mine safety matters which establish height requirements for structures such as the subject overpass (T. 382).

The U.S. Department of Transportation's Manual on Uniform Traffic Control Devices (Ex. C-14) requires signs when less than 12 inches clearance is provided over the highest vehicle being used on the roadway (T. 380-381).

Chief Engineer Weigand expressed the opinion that prior to the accident the overpass structure was not "dangerous" "perilous" or "risky" (T. 386). As noted previously, there had been no prior accidents at the overpass, and in view of (1) the significant clearance height of the overpass (ranging from 20-27 feet approximately), (2) the general compliance of the structure with requirements other governmental agencies (T. 380-384)), (3) the general opinions of Western Fuels witnesses that the overpass was not "perilous" or dangerous, (4) the vagueness of MSHA's evidence and theory that the overpass was hazardous, and (5) the fact that the accident under scrutiny herewas caused by the forgetfulness of a truck driver who broke the rule against driving with the bed raised and who had been passing under the overpass some 20 times a day for months, it is concluded that the overpass clearance was not "hazardous" within the meaning of the regulation cited and that no violation occurred.

ORDER

(1) Withdrawal Order No. 2835325 and its modifications are affirmed.

(2) Citations numbered 2835326 and 2835327 (including its "Significant and Substantial" designation) are affirmed.

(3) Citation No. 2835328 is vacated.

Contestant/Respondent Western Fuels shall pay the Secretary of Labor the total sum of \$450.00 as and for the civil penalties hereinabove assessed on or before 30 days from the date of this decision.


Michael A. Lasher, Jr.
Administrative Law Judge

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/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 5 1988

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 87-77-M
Petitioner	:	A.C. No. 34-00026-05513
v.	:	
	:	Tulsa Cement Plant
BLUE CIRCLE INC.,	:	
Respondent	:	

DECISION

Appearances: Michael Olvera, Esq., Office of the Solicitor,
U.S. Department of Labor, Dallas, Texas, for
the Petitioner;
Robert McCormac, Industrial Relations Manager,
Blue Circle Inc., Tulsa, Oklahoma, for the
Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments in the amount of \$377 for five alleged violations of certain mandatory safety standards found in Part 56, Title 30, Code of Federal Regulations. The respondent filed an answer denying the violations, and a hearing was held in Tulsa, Oklahoma. The parties were afforded an opportunity to file posthearing briefs, and the respondent's arguments presented therein have been considered by me in the adjudication of this matter. The petitioner opted not to file any posthearing arguments.

Issues

The issues presented in this proceeding are whether the respondent violated the cited mandatory safety standards, and if so, the appropriate civil penalty to be assessed for those

violations based on the criteria found in section 110(i) of the Act. Also at issue are the inspector's "significant and substantial" (S&S) findings, and the respondent's contention that the petitioner failed to follow its civil penalty assessment regulations by not affording the respondent an opportunity for a conference with respect to one of the modified citations.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.
2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).
3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated to the following (Tr. 3):

1. The respondent's history of violations during the 24-month period prior to the issuance of the citations in issue in this case consists of ten (10) violations issued during the course of 40 inspection days.
2. The respondent's Tulsa Cement Plant had an annual production of 235,139 tons, and the annual production rate of its parent corporation, Blue Circle, Incorporated was 1,577,966 tons.
3. The payment of civil penalties for the violations in question in this case will not adversely affect the respondent's ability to continue in business.
4. The respondent's representative stated that the respondent mines limestone, and that the product produced is Portland cement.

Discussion

The contested citations were issued by MSHA Inspector James M. Smiser during the course of inspections he conducted at the mine on March 24 and 25, 1987, and they are as follows:

Section 104(a) "S&S" Citation No. 2870013, March 24, 1987, cites a violation of 30 C.F.R. § 56.20003(a), and the condition or practice states as follows:

The passageway on the #3 conveyor, in crushing division, was not maintained in a

clean and orderly condition. An excessive amount of rock and materials were allowed to accumulate on passageway, making movement hazardous for employee.

Section 104(a) "S&S" Citation No. 2870015, March 24, 1987, cites a violation of 30 C.F.R. § 56.4102, and the condition or practice states as follows:

The combustible liquid spillage and leakage, at the Allis-Chalmers primary crusher hydraulic control center, was not removed in a timely manner, or controlled to prevent a fire hazard. The oil spill/leak was large enough to cover floor area used as a passageway.

The citation was subsequently modified on May 11, 1987, to change the cited standard from section 56.4102 to section 56.20003, and the condition or practice was modified to read as follows:

The floor at lower level of the primary crusher work area was not maintained in a clean and dry condition. The hydraulic (sic) oil spillage and leakage at the hydraulic (sic) control center covered the floor area used as a passageway.

Section 104(a) "S&S" Citation No. 2870016, March 24, 1987, cites a violation of 30 C.F.R. § 56.20003(a), and the condition or practice states as follows:

The passageway on west end of primary crusher discharge leaf conveyor was not maintained in a clean and orderly condition. The passageway was cluttered with steel plates, wood, and other materials.

Section 104(a) "S&S" Citation No. 2870742, March 24, 1987, cites a violation of 30 C.F.R. § 56.6112, and the condition or practice is described as follows:

The burning rate of the safety fuse in use at quarry operation was not measured, posted in conspicuous location, and brought to the attention of all persons concerned with blasting. The last posted burning rate was 1985.

Section 104(a) "S&S" Citation No. 2870741, March 25, 1987, cites a violation of 30 C.F.R. § 56.11012, and the condition or practice is stated as follows:

The opening at far east end of travelway, on north side of conveyor, between plant and clinker storage area is not provided with railings, barriers, or covers, to provide employee protection from a 15 to 20 feet fall, to bottom of storage bin.

MSHA's Testimony and Evidence

MSHA Inspector James S. Smiser, testified as to his background and experience, and he confirmed that he issued the citations in question during the course of a scheduled regular inspection conducted at the mine. He described the mine as an open pit limestone mine with an associated cement mill, and he confirmed that the mine employed approximately 80 employees working three shifts (Tr. 6-9).

Citation No. 2870013 - 30 C.F.R. § 56.20003(a)

Inspector Smiser stated that he issued the citation for an accumulation of materials which he found along an inclined conveyor belt that is used in conjunction with the crushing of materials. He believed that the material had fallen off the belt onto the walkway or passageway along the north side of the belt which proceeded from ground level up into the mill building. The crushed limestone material was of various sizes, from three-quarters of an inch to an inch and a half, and in some areas it completely covered the walkway surface, running over the kick-plate located along the side of the floor of the walkway. He confirmed that section 56.20003(a) requires that passageways or walkways be maintained in a safe condition free of accumulated materials, and in his opinion, the cited accumulations presented a tripping or falling hazard. The purpose of the three-inch kickplate was to prevent the materials from falling off the walkway to the ground level below and to prevent persons using the walkway from falling off the walkway. He confirmed that a standard handrail, with an upper and mid rail, was installed along the walkway (Tr. 10-11).

Mr. Smiser stated that his gravity finding of "highly likely" was based on his opinion that the presence of accumulated materials above the kickplate level presented a "very great chance" of someone falling. Although someone falling would not fall to the ground level below, they would probably

catch themselves within the walkway area, but could possibly sustain a back injury or a broken arm, leg, or ankle. He determined that one individual such as a serviceman conducting an equipment inspection regularly travelled the walkway and would be exposed to the hazard. Such a person would normally be carrying a grease gun or other service equipment in one hand, leaving only one hand free for balance in the event he fell. This increased the chances of an injury.

Mr. Smiser believed that it was reasonably likely that the hazard created by the accumulations would result in an injury of a reasonably serious nature (Tr. 11-13). Mr. Smiser confirmed that he made a finding of "moderate negligence" based on information supplied to him during his close-out conference which indicated that the accumulations had existed prior to his inspection and would have been there more than one time. He was told that the accumulations resulted from an engineering problem associated with the conveyor and were often present. Abatement was achieved by the removal of the materials from the walkway (Tr. 13).

On cross-examination, Mr. Smiser stated that it was unlikely that anyone could slip completely under the handrail, and he confirmed that he was familiar with the respondent's belt maintenance procedures (Tr. 28).

Citation No. 2870015 - 30 C.F.R. § 56.4102

Mr. Smiser stated that he issued the citation after finding spillage of hydraulic fluid caused by a leak of a crusher hydraulic system located in the crusher plant. The spillage was located on the concrete floor area which was surrounded by handrails. The leak had been present for some time, and in an effort to control it, clay absorbent material was spread over the spillage in an effort to dry it up. At a later date, wooden planks were put down over the spillage for access around the crusher to the hydraulic control unit. Mr. Smiser stated that section 56.4102 requires that the floor "be kept clean and orderly" (Tr. 15).

Mr. Smiser believed that the cited condition presented a probable slip and fall hazard to a serviceman who periodically was in the area to check the hydraulic oil in the crusher unit, and that he would likely suffer back injuries if he were to slip and fall on the walkway surface. Mr. Smiser estimated that the variance between the flat walking surface and the planks ranged between zero and 3 inches. He believed the condition resulted from "high negligence" because it was obvious that the spillage and leakage had existed for some time since

the clay absorbent material and wooden planks had been used in an attempt to control the spillage. The violation was abated by the removal of the spillage and controlling the leak (Tr. 16-17).

On cross-examination, Mr. Smiser confirmed that his citation was subsequently modified on May 11, 1987, to delete the reference to section 56.4102, and to replace it with section 56.20003, and that his original negligence finding was modified from "moderate" to "high." Mr. Smiser confirmed that the modifications were made after a post-citation conference with his supervisor Russell Smith in which he and Mr. McCormac were involved. Mr. Smiser confirmed that he believed the original citation was properly issued but that Mr. Smith believed that the cited hydraulic oil was not as combustible as he (Smiser) had originally believed, and that the decision to modify the citation was made by Mr. Smith (Tr. 30). Mr. Smiser stated that the modified citation was mailed to the respondent and he had no knowledge as to whether or not another conference was held to discuss a clean-up problem rather than a combustibility problem (Tr. 31). Mr. Smiser conceded that the use of absorbent materials and the installation of wooden planks on the floor in an area of spillage is normally done to alleviate or avoid problems and as an effort to provide safe access. He was sure that a serviceman had to go to the area to check the hydraulic oil, but could not state how often this would occur (Tr. 32-33).

Citation No. 2870016 - 30 C.F.R. § 56.20003(a)

Inspector Smiser stated that he issued the citation after finding steel plates, wood, and other materials such as cans of lubricant on the walkway which had been constructed around a leaf conveyor. The conveyor itself was well guarded and presented no problem. The steel plates consisted of removable inspection and service covers which had apparently been removed at some previous time and left on the walkway. The plates were located at the top of a staircase leading to the walkway. Once reaching the top of the staircase, one had to step on top of the plates which were stacked unevenly on top of each other in a "tipping" manner. Since there was no solid walkway surface, he believed that it was reasonably likely that an injury would occur in the event of a slip or fall (Tr. 18).

Mr. Smiser stated that the walkway in question was in a very isolated area of the plant which was not traveled by a large number of people, but that a serviceman in the area servicing the conveyor and associated equipment once a shift

would be exposed to the hazard. Mr. Smiser believed that if a slip or fall injury occurred, there was a reasonable likelihood that it would be of a reasonably serious nature. He made a determination of "moderate negligence" on the basis of the amount of stone dust on top of the plates and other materials, indicating that they had been present for some time. The violation was abated by the removal of the materials (Tr. 18-19).

On cross-examination, Mr. Smiser stated that the passageway in question did not lead to any other location, and in order to get back from where one started, one would have to turn around and go back in the opposite direction. Under the circumstances, it would be unlikely that employees on any casual travel through the plant would use the cited passageway, and any hazard exposure would be extremely limited on the platform. Mr. Smiser confirmed that it was possible that a failure of a dust collector earlier on the day of his inspection could have caused the presence of the dust which he observed on the materials, and that such a failure could possibly accumulate dust in a fairly rapid period of time (Tr. 40). The removal of the plates from the conveyor would not pose a hazard to employees in the area from which they were removed because the walkway would not normally take anyone to that particular area (Tr. 49).

Citation No. 2879742 - 30 C.F.R. § 56.6112

Mr. Smiser stated that he issued the citation after finding that the last safety fuse burning rate posted in the magazine was dated 1985. Since his inspection was conducted in 1987, he was concerned that the 1985 burning rate may not have referred to the identical material which was burned and then marked on the wall for use in 1987. He was also concerned with the fact that the 1985 fuse burning rate was currently being maintained as it was in 1985, and that explosives "have of a way of aging unpredictably." He believed that a more current rate should have been posted, and he pointed out that the explosive manufacturer's literature suggests that the age of explosives is very unpredictable in terms of performance. Under these circumstances, he stated that "I was not comfortable with the two-year time," and he confirmed that the explosives industry recommends that explosives should be tested at least once a year. He also confirmed that section 56.6112 does not include any dating requirement (Tr. 20-21).

Mr. Smiser stated that he based his gravity finding of "reasonable likely" on the fact that if the fuse burning rate was greatly increased, an individual using the explosives may not be able to get away from it before an explosion took place.

If he could not, serious injuries would result to one individual lighting the fuse (Tr. 22). He made a finding of "low negligence" because the respondent made an effort to comply by posting the 1985 fuse burning rate and did not ignore the regulation. Abatement was achieved by testing the current fuse burning rate, and this was done by cutting off a measured length and determining the proper fuse burning rate and re-posting it. He could not recall the exact burning rate time but indicated that it "was very close" to the 1985 rate which had been previously posted (Tr. 22-23).

On cross-examination, Mr. Smiser confirmed that the frequency of posting a fuse burning rate, as recommended by a manufacturer such as Dupont, cannot be readily ascertained by anyone by simply looking through MSHA's Part 56 standards, and that one cannot know by reference to these regulations as to whether or not MSHA has incorporated these recommendations as part of its regulatory mandatory standards. He also confirmed that the only way for the respondent to know whether the recommendations by a manufacturer have been adopted by MSHA is to ask an inspector when a citation is issued, or by a reference to the recommendation itself (Tr. 42).

Mr. Smiser stated that while other MSHA standards do incorporate alcohol, tobacco, and firearms regulations and provisions of the National Electric Code as part of its regulations, one cannot find how often a safety fuse burning rate should be posted because Dupont's blasting guides are not incorporated by the cited standard (Tr. 42-43). Assuming that the fuse burning rate posted at the time of the citation was the same as the earlier rate 2 years ago, Mr. Smiser saw no need to post it again and he would simply change the date (Tr. 43-44). Mr. Smiser confirmed that he determined that the fuse in the magazine which was being used in 1987 came from an identical spool which was purchased in 1985 or earlier (Tr. 44). Mr. Smiser confirmed that periodic blasting was taking place during March, 1987, and assuming his inspection took place in 1985, no citation would have been issued because the burning rate was posted and brought to the attention of mine personnel. He issued the citation because the posted burning rate was outdated and at least 2 years old (Tr. 48-49).

Citation No. 2870741 - 30 C.F.R. § 56.11012

Mr. Smiser stated that he issued the citation after finding that an opening at the end of a travelway alongside an inclined conveyor running between the cement processing building and the clinker storage area was unguarded and had no barrier to prevent an employee from stepping off the walkway

into the storage area below. Although the respondent's practice concerning the wearing of safety glasses and safety equipment was very good, since the materials being transferred from the belt to the storage area were hot, any given any humidity present in the area, safety glasses can "fog up" very quickly when one steps into the storage area. Mr. Smiser was concerned that the unguarded area posed a potential for someone slipping off the edge of the travelway into the storage bin. Section 56.11012 required a barrier or cover on the open-ended walkway (Tr. 24).

Mr. Smiser confirmed that although the unguarded area was small, with a little walking area, a serviceman would be in the "slipping area" and could fall through the unguarded opening for a distance of 15 to 20 feet or less, depending on the build-up of loose materials in the cone-type configuration bin below. Although he believed that someone falling into the bin would have his fall broken by the loose materials and would probably not suffer fatal injuries, he believed that they would probably suffer a back injury or broken bones. A serviceman in the area servicing the dead pulley and associated conveyor parts would be exposed to the hazard (Tr. 25).

Mr. Smiser stated that he made a finding of "low negligence" because the respondent had not discovered the opening or it probably would have covered it, and MSHA had not previously defined this area as a problem. The violation was abated after the respondent provided a guard at the end of the walkway (Tr. 26).

On cross-examination, Mr. Smiser stated that the conveyor walkway entered the storage area of the adjacent building where the tail pulley was located. He confirmed that it would be unlikely that an employee would use the walkway as a means of traveling from one point to another, except for performing some work in the area. In the event that no work had been done in the area for weeks or months, this would possibly explain why the opening was not discovered, and it was possible that there was extremely infrequent traffic in this area. Even so, he still believed that it was not unlikely that an accident could occur (Tr. 46). However, he would be surprised if there was no one in the area at least once a shift to check the conveyor service points, head pulley gear box, and to check oil levels and grease the equipment (Tr. 47).

Respondent's Testimony and Evidence

Lee Bales, retired quarry superintendent, testified as to his work experience, and he confirmed that he was actively

employed during the time of the inspection. Respondent's representative made a videotape presentation of the locations where the violations in question were issued, and Mr. Bales explained what was depicted in the various scenes shown on the videotape. The videotape was presented for the purpose of familiarizing the court, and the parties, with the location and physical parameters of the areas covered by the citations issued by Inspector Smiser. Respondent's representative confirmed that the videotape was made subsequent to the issuance of the citations, and that it does not show the area concerning the safety fuse burning rate citation (2870742), and that Citation No. 2870741, dealing with the unguarded opening at the end of the conveyor would be covered by another witness (Tr. 61, 79).

Citation No. 2870013

Mr. Bales explained the purpose of the conveyor, and he confirmed that the floor is constructed of grating, and that the conveyor operates 5 days a week 8 hours a day. He stated that an employee walking through the quarry area would have no reason to use the conveyor as a regular means of travel from one place to another, and that they would normally use a staircase to gain access to the crusher building. However, the conveyor walkway is used to gain access to the conveyor in the event of maintenance problems or when the system is down for maintenance or service. Normal operational procedures call for the cleaning of the walkway when maintenance is required, and in his 10 years as a supervisor there were no accidents or injuries caused by materials on the walkway (Tr. 62-65). Any greasing could be done from ground level by means of grease hoses (Tr. 77).

Citation No. 2870015

Mr. Bales stated that there is no need to walk through the cited area in the normal course of travel in the plant, and the only need for anyone to be there is to perform maintenance work. A lubrication pump in the area periodically causes oil leakage problems due to the over-tightening of a "weeper seal," and attempts are made to keep any leakage off the walkway floor by means of a bucket kept under the pump. In addition, the area is always wet due to rain water running into the area from outside, and "soakum" material and wooden planks were used to alleviate these oil leakage and water problems until the area could be cleaned up. Mr. Bales stated further that because of production and equipment difficulties in any crushing operation there are occasions where more than one area of the plant is in an unclean condition, and that in

the exercise of his judgment as a supervisor, he must determine which area needs to be cleaned first. Any such decisions are made primarily on the basis of safety and any potential employee hazard exposure, and secondarily, any potential equipment damage. In his view, the cited area was a low hazard area, and that the respondent's safety record attests to this (Tr. 65-67).

On cross-examination, Mr. Bales stated that the pump is operating constantly when the crushing system is running, and during the winter months it operates all day. This causes a seal "seepage" problem, and the buckets used to catch the overflow would run over, and this would result in "a film of oil" on the floor. The oil would never run over the wooden planks (Tr. 75-76).

Citation No. 7870016

Mr. Bales stated that except for little maintenance work, employees traveling through the cited area would not normally use the passageway as a route to another work place. Any oiling of equipment would be done while the equipment was idle, and any clean-up judgments are made on the basis of the hazard involved, and in his opinion the cited conditions would not likely cause any accident of a reasonably serious nature (Tr. 69).

Citation No. 2870742

Mr. Bales confirmed that he supervised the blasters, and he explained the state training and licensing requirements for blasters. He stated that the respondent uses safety fuses to shoot water out of holes by means of a power primer and a 3-foot length of fuse. Other blasting is done by an electrical "non-els" system. All blasters working for him are certified, and they are instructed in the proper use of safety fuses. The safety fuses were not used very often, and at times, 2 or 3 months would pass before there was a need to blast water out of holes.

Mr. Bales stated that he determined the burning rate of the safety fuse by burning it, and the rate was posted in the magazine, a conspicuous place for employees who had access to the fuse. Only he and the blaster had such access, and in his opinion, he complied with the requirements of section 56.6112. He confirmed that the standard contains no time restraints on the frequency of posting the fuse burning rate, and he would always test the fuse burning rate and post it as necessary.

The standard does not require posting each time the fuse rate is tested (Tr. 69-73).

On cross-examination, Mr. Bales confirmed that for many years safety fuses have only been used for shooting water out of holes. He also confirmed that he was "comfortable" with the posted 1985 fuse burning rate, and if he were not, he would have checked it and changed the date (Tr. 75).

Kenneth A. Lloyd, Process Engineer, and former maintenance manager for 9 years, testified that he was familiar with most of the plant areas and has had occasion to be in those areas during his employment with the respondent. Referring to a videotape presentation concerning Citation No. 2870741, Mr. Lloyd explained the operation of the conveyor in question and described the location where the citation was issued. He confirmed that the alleged unguarded area was at the end of the conveyor where a chain was installed, but not hooked up (Tr. 86). Respondent's representative asserted that there were two chains in place, but that neither were hooked up. Mr. Lloyd confirmed that the conveyor ends at the point where one can enter the adjacent storage area, and that anyone walking to the end of the conveyor would have to turn around and go back, since the walkway ended at that point (Tr. 87-88).

Mr. Lloyd stated that a platform was installed several years ago to facilitate some electrical work in connection with the clinker storage area, but that normal maintenance work was not performed from that platform. The platform is used as access to a gate system used for freeing any material blockage which seldom occurs. Any employee required to be on the platform would use standard safety equipment such as a safety belt and safety line attached to the handrailing (Tr. 89). No one is required on the platform to perform any routine inspection or lubrication of the conveyor, and in his opinion it was not reasonably likely that a serious injury would result from the lack of a barrier at that platform location (Tr. 90).

On cross-examination, Mr. Lloyd confirmed that the chains were originally installed as a safety barrier so that someone could reach into the chute area with a pole to free any material blockage. It was his understanding that the chains were unhooked at the time of the inspection (Tr. 90). In the event the chains are unhooked, an employee would be required to wear a safety belt (Tr. 91). In response to further questions, Mr. Lloyd confirmed that the platform was located at the same location as the end of the conveyor, which ends at the same approximate location. He also confirmed that there

was a space between the platform and the conveyor, and if the chains were not hooked up, there would be a drop to the storage area below. A railing was provided for protection for anyone falling off the conveyor travelway. Respondent's representative confirmed that the chain location was the area which concerned the inspector, and Inspector Smiser agreed. Mr. Smiser could not recall the presence of any installed chain, and confirmed that there was no barrier there. He also confirmed that a handrailing was provided, and assuming the presence of an unhooked chain, he would have issued a citation for not having the chain up. Respondent's representative stated that he was with the inspector during his inspection, and was surprised that the chains were not hooked up. Mr. Smiser confirmed that he did not have his inspection notes with him (Tr. 92-95).

Robert McCormac, respondent's representative, reiterated under oath that he was with the inspector and that a chain was installed but was not hooked up. He confirmed that on prior visits the chain was always hooked up, and that he was surprised that it was not hooked up at the time of the inspection. Although the citation does not refer to any chain, he was convinced that the citation was issued because the chain was not attached across the end of the walkway (Tr. 96). He also agreed that there was an opening beyond the chain location (Tr. 97).

With regard to Citation No. 2870015, Mr. McCormac read a prepared handwritten statement explaining the respondent's position concerning the citation. The statement consists of arguments pointing out the modification to the citation, the subsequent conference held with MSHA's district manager, and the fact that the respondent was not afforded another conference after the citation was modified (Tr. 97-105). Mr. McCormac conceded that the cited conditions did exist (Tr. 106).

Findings and Conclusions

Fact of Violations

Citation Nos. 2870013 and 2870016, 30 C.F.R. § 56.20003(a)

The inspector issued these citations after finding accumulations of rock and materials along the passageway of the No. 3 belt conveyor, and steel plates, wood, and other materials along a passageway at the west end of a primary crusher leaf conveyor. He cited a violation of the housekeeping

requirements of mandatory standard section 56.20003(a), which provides as follows:

At all mining operations-

(a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly;

* * * * *

In its posthearing arguments, respondent takes the position that the cited areas were not "passageways," and that the citations should be vacated. Citing Webster's Dictionary definition of a passageway as "a way that allows passage to or from a place or between two points," and relying on the testimony of its former quarry supervisor Mr. Lee Bales, that employees walking through the quarry area would not have reason to use the conveyor walkways as a normal means of getting from one place to another, or for access or as a means of travel to any point in the plant, the respondent concludes that the cited areas were not passageways.

The definitions found in section 56.2, do not define the term "passageway." The term "travelway" is defined as "a passage, walk or way regularly used and designated for persons to go from one place to another." Webster's New Collegiate Dictionary defines the term "passageway" as "a way that allows passage."

While it may be true that the No. 3 conveyor passageway was not used by mine personnel in general as a means of travel from the quarry to the plant, the facts show that it was a walkway adjacent to the inclined conveyor which provided a means of travel and access to the conveyor by mine personnel and others who had a need to be there from time to time. As a matter of fact, the parties in this case characterized the "passageway" as a "walkway," and on the facts here presented those terms are used interchangeably. Inspector Smiser testified that the walkway or passageway was used on a regular basis as a means of travel along the conveyor by service personnel for inspection or maintenance purposes.

With regard to the leaf conveyor location, the inspector characterized the passageway as a walkway which provided access to the conveyor and associated equipment, as well as certain removable conveyor inspection and service plates. Although the inspector conceded that the cited area was not frequently travelled and was rather isolated, he confirmed

that a serviceman would be in the area at least once during each shift to service the conveyor and other equipment.

Quarry superintendent Bales testified that the No. 3 conveyor walkway was used as a means of access to the conveyor for maintenance or servicing, as well as for routine cleaning of the walkway. As for the leaf conveyor, he confirmed that while no one would normally use the passageway or walkway as a means of travel to another workplace, service personnel would have occasion to be in the area for routine cleanup or maintenance work.

Respondent's reliance on the Allied Chemical Corporation decision, 2 FMSHRC 950 (April 1980), is not well-taken. In that case, the operator was cited with a violation of mandatory safety standard section 56.11-1, which required that a safe means of access be provided and maintained to all working places. The violation was issued after an inspector found an accumulation of muck on a platform. Former Commission Judge Forrest Stewart vacated the citation after finding that the record did not establish that the platform was a "working place" with the definition of that term pursuant to section 56.2, because there was no evidence that any work was being performed, had ever been performed in the past or would be performed in the future, while the accumulation was present. Judge Stewart observed that the cited standard was not a housekeeping standard, but one requiring safe access to places where work is being performed.

The Standard Slag Company decision, 2 FMSHRC 3312, 3324 (November 1980), cited by the respondent, also concerned a violation of the safe access requirement of section 56.11-1, and I vacated the citation after finding that a cited catwalk and platform under a conveyor was not a "working place" within the definition found in section 56.2. The Magma Copper Company case cited by the respondent, 1 FMSHRC 837, 856 (July 1979), concerned a violation of section 57.11-12, which required that openings above, below, or near travelways be protected by barriers. I vacated the citation after finding that an elevated platform located 100 feet off the ground, and which was used infrequently, was not a travelway within the meaning of the cited standard or the section 57.2 definition of that term.

In the instant case, the respondent is charged with a violation of the housekeeping requirements of section 56.20003(a) which required passageways to be kept clean and orderly. It is not charged with a failure to provide a safe means of access to a working place. Further, the fact that clean-up of the conveyor adjacent to the cited passageway was

a regular part of the respondent's maintenance effort is only relevant insofar as the negligence and gravity connected with the violation is concerned. It may not serve as an absolute defense in a situation where the inspector finds an accumulation of rock and materials which may pose a hazard to anyone walking along the conveyor passageway. The presence of such accumulations do not comply with the requirement that such areas be kept clean.

The respondent has not rebutted the fact that the cited accumulations of rock materials were in fact found by the inspector along the cited conveyor walkway or passageway in question, nor has it rebutted the existence of the steel inspection plates, wood, and other materials such as cans of lubricant on the walkway on the location of the leaf conveyor. The cited standard section 30 C.F.R. § 56.20003(a), requires that such areas be kept clean. Given the existence of the materials found by the inspector, I conclude and find that the cited areas were not maintained in a clean condition as required by the cited standard, and that the failure by the respondent to keep these areas clean constituted violations of the standard. Further, I reject the respondent's arguments that the cited areas were not passageways. To the contrary, regardless of whether they are characterized as "passageways" or "walkways," the facts here establish that the cited locations provided a means or travel, access, and passage to and from the cited areas by mine personnel who would have a need to be there for service, maintenance, or cleanup work. Accordingly, the citations ARE AFFIRMED.

Citation No. 2870015 - 30 C.F.R. § 56.20003

This citation was issued on March 24, 1987, after the inspector found some oil spillage on the floor area at the primary crusher hydraulic control center. He characterized the spillage as "combustible," and stated that it was large enough to cover the floor areas used as a passageway. The inspector stated that the spillage was "not removed in a timely manner, or controlled to prevent a fire hazard," and he cited a violation of mandatory standard section 56.4102, which provides as follows:

Flammable or combustible liquid spillage or leakage shall be removed in a timely manner or controlled to prevent a fire hazard.

The citation was subsequently modified on May 11, 1987, and it was served on the respondent. The modified citation

deleted any reference to section 56.4102, and charged a violation of the housekeeping requirements of section 56.20003, which provides as follows:

At all mining operations--

(a) Workplaces, passageways, storerooms, and service rooms shall be kept clean and orderly;

(b) The floor of every workplace shall be maintained in a clean and, so far as possible, dry condition. Where wet processes are used, drainage shall be maintained, and false floors, platforms, mats, or other dry standing places shall be provided where practicable; and

(c) Every floor, working place, and passageway shall be kept free from protruding nails, splinters, holes, or loose boards, as practicable.

In addition to the change in the referenced standard allegedly violated, the cited condition or practice was modified to read as follows:

The floor at lower level of the primary crusher work area was not maintained in a clean and dry condition. The hydraulic oil spillage and leakage at the hydraulic control center covered the floor area used as a passageway.

Inspector Smiser confirmed that the modification was made by his supervisor Russell Smith because Mr. Smith made a determination that the hydraulic oil spill was not combustible as Mr. Smiser originally had believed.

In its posthearing brief, the respondent argues that the amended citation is procedurally defective because MSHA failed to provide the respondent with an opportunity for a conference with its district manager after the modification of the citation, and that the inspector was not made available to the respondent for a post-inspection conference to discuss the amended citation. Although the citation was issued under the same number as the original citation, the respondent takes the position that it was in fact a new citation citing a new standard, and that it required a notification to the respondent of its right to a conference on the newly amended citation.

The respondent concedes that it was afforded a conference with the district manager on the original citation. However, it takes the position that to change a citation from a flammable liquid to a housekeeping violation because evidence submitted by the respondent during the conference proved the inspector wrong with respect to the question of the combustibility of the oil spillage is an abuse of MSHA's discretion. Citing the decision in Standard Slag Company, 4 FMSHRC 3312, 3322-3323 (November 1980), and El Paso Rock Quarries, Inc., 1 FMSHRC 35, 38 (January 1981), the respondent asserts that MSHA has not always been allowed the discretion to modify citations once they are written.

In the Standard Slag Company case, I rejected MSHA's attempts to amend its civil penalty proposal to alternatively charge an operator with a violation of a standard different from the one originally charged. The facts in that case reflect that MSHA's attempts to amend the citation came after the trial of the case after all of the evidence was in, and it took the form of a motion filed by MSHA as part of its post-hearing arguments. In the El Paso Rock Quarries case, the Commission affirmed the trial ruling of a judge who denied MSHA's request at the opening of the hearing to amend a citation to reflect a change in the originally cited standard. The Commission held that "Granting or denying amendments is largely a discretionary matter with the judge," and it found no abuse of discretion, even though it may have ruled differently as an initial matter.

The facts in the instant case are clearly distinguishable from those in Standard Slag and El Paso Quarries. In the case at hand, the original citation was amended and modified prior to the filing of the case with the Commission. A copy of the modified citation was served on the respondent, and the respondent has had its day in court and has been given a full opportunity to present its defense. Further, there is no evidence in this case that the respondent ever requested a conference with MSHA on the newly amended citation. While it is true that 30 C.F.R. § 100.6, provides an opportunity to a mine operator to request a conference upon notice from MSHA, I note that the granting of such conferences is within MSHA's sole discretion. In any event, I find no basis for concluding that the respondent has been prejudiced by MSHA's failure to notify it of its right to a conference or because a conference was not held. The respondent has had a full opportunity to be heard on the merits of the alleged violation during the hearing on the contested citation, including its right to confront and cross-examine the inspector, and to present its testimony

and evidence in defense of the citation. Under the circumstances, the respondent's assertion that the contested modified citation was procedurally defective IS REJECTED.

With regard to the merits of the citation, the respondent argues that the cited location was not a "passageway," and it cites the testimony of Inspector Smiser who indicated that once an employee goes into this area the only way out is the way he or she came in, and that it would be unlikely for employees in casual travel through the plant area to use this "passageway." Respondent also cites the testimony of Mr. Bales who indicated that the access to this area leads nowhere and there would be no need for people to walk this area during the course of their daily travel in the plant.

For the reasons stated in my previous findings concerning Citation Nos. 2870013 and 2870016, the respondent's "passageway" arguments are rejected. The respondent has tacitly admitted that the cited location provided an access route to the crusher unit, and Inspector Smiser testified that service personnel were in the area periodically to check the hydraulic oil used for the crusher. Mr. Bales confirmed that people would be in the area to perform maintenance work, and that a lubrication pump in the area periodically presented known leakage problems which required a bucket to be kept under the pump to prevent leakage onto the walkway floor. Further, the placement of wooden planks and "soakum" material in the area in an effort to alleviate the leakage problems supports a reasonable conclusion that personnel had a need to be in the area to perform work. Under these circumstances, it seems clear to me that the cited location was not only a passageway providing access to the area, but was also a workplace area which was required to be kept clean. The respondent has not rebutted the existence of the oil spillage and leakage as described by the inspector, and the placement of planks, and the use of "soakum" and a bucket reasonably suggest that the spillage covering the cited area was more than "a film of oil" as suggested by Mr. Bales. Since the area was not kept clean and dry as required by the standard, I conclude and find that a violation has been established, and the citation IS AFFIRMED.

Citation No. 2870742 - 30 C.F.R. § 56.6112

The inspector issued this citation after finding that the burning rate of the safety fuse used at the quarry for blasting purposes was not measured, posted conspicuously, or brought to the attention of mine personnel engaged in blasting activities. He cited an alleged violation of mandatory safety standard section 56.6112, which provides as follows:

The burning rate of the safety fuse in use at any time shall be measured, posted in conspicuous locations, and brought to the attention of all persons concerned with blasting.

Inspector Smiser confirmed that he issued the citation because he believed that the posted fuse burning rate was outdated and at least 2 years old. However, he conceded that the cited standard does not include any dating requirements for determining the fuse burning rate, and the credible evidence produced by the respondent, including the inspector's own admissions, reflects that the respondent did in fact comply with the standard by measuring the burning rate of its fuses, posting the results in a conspicuous place, and bringing it to the attention of personnel engaged in blasting. Respondent's evidence also established that all certified blasters were instructed in the proper use and handling of explosives, and that all fuses were properly tested and the fuse burning rates posted as necessary. Under all of these circumstances, I agree with the respondent's posthearing arguments in defense of this citation, and I conclude and find that MSHA has advanced no probative credible evidence to support a violation. Accordingly, the citation IS VACATED.

Citation No. 2870741 - 30 C.F.R. § 56.11012

The inspector issued this citation after finding that an opening at the end of a travelway alongside an inclined conveyor located between the cement processing building and a clinker storage area was unguarded and had no barrier to prevent anyone from stepping or falling off the end into the clinker storage area below. Mr. Smiser further described the location of the unguarded area as the north side of the conveyor where it entered the enclosed building for a short distance around the conveyor head pulley. He cited a violation of mandatory standard section 56.11012, which provides as follows:

Openings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed.

Section 5.62 defines a "travelway" as "a passage, walk or way regularly used and designated for persons to go from one place to another."

In its posthearing brief, the respondent asserts that Inspector Smiser's inaccurate testimony regarding the location of the unguarded conveyor location in question should render the citation null and void. This defense is rejected. Although the inspector's testimony may have been imprecise, it seems clear to me from the testimony of both Mr. Lloyd and Mr. McCormac that they were clearly aware of the cited location which the inspector had in mind when he issued the citation. During his video presentation, Mr. Lloyd described the cited location, and Mr. McCormac also pinpointed the area and confirmed that the inspector was concerned about the "opening at the end of the conveyor" where two chains were installed as a barrier, but not hooked up. When asked whether this was the location referred to in the citation, Mr. McCormac replied "yes sir" (Tr. 87). Inspector Smiser in turn confirmed that this was the area he cited (Tr. 88). Further, Mr. McCormac testified that he was with the inspector during his inspection, agreed that there was an opening beyond the location of the chain, and confirmed the cited condition did in fact exist (Tr. 95-97; 106).

Respondent further argues that the cited location was not a "travelway" within the definition found in section 56.2, in that it was not regularly used as a means of access in the normal course of travel through the plant area, and was not used for normal maintenance purposes. Respondent's witness Lloyd characterized the cited location as a seldom used "platform" area providing access to a gate system used for freeing up any blocked material. When this is done, an employee would use a safety line or belt attached to the handrailing which was installed around the perimeter of the platform. Mr. Lloyd also confirmed that the area is not used for routine inspections or maintenance, and once reaching the end of the platform, one would have to turn around and go back.

Mr. Lloyd confirmed that the platform was originally constructed a few years ago when there was an electrical problem, and that the chain was installed as a means of a safety barrier in the event one needed to stand on the platform with a pole to free up any material blockage. Mr. McCormac also saw a chain at the cited location, was surprised that it was not hooked up, and he surmised that the citation was issued because the chain was not hooked up. The inspector could not recall any chain in place, and he did not have his inspector's notes with him. Although he confirmed that the citation was abated after a barrier was installed, he did not elaborate further as to the type of barrier which was installed, and the

termination notice issued to abate the citation provides no further information in this regard.

The video tape taken for demonstration purposes during the hearing clearly depicted the installation of two chains across the opening which concerned the inspector, and I find the testimony of Mr. McCormac and Mr. Lloyd with respect to the presence of the chains at the time of the inspection to be credible. I further find Mr. McCormac's conclusion that the inspector probably issued the citation because the chains were not up at the time of his inspection to also be credible. Since the chains were not up and stretched across the opening of the platform at the time of the inspection, one can reasonably conclude that no barrier was provided at that time as a means of protection to prevent one from going off the end of the platform. Assuming that the cited opening was near a travelway as stated in section 56.11012, and as that term is defined by section 5.62, I would affirm the citation based in the undisputed fact that the opening in question was not protected by the chain which was not in place across that opening. However, the critical question here is whether or not the cited location was in fact a "travelway."

Inspector Smiser described the cited location as "small, with a little walking area," and he characterized it as an "open-ended travelway" and "open-ending walkway" (Tr. 23-24). He surmised that a serviceman would "probably" be in the area, and "guessed" that he would be within the "slipping area" and could fall through the opening in the course of any "normal work" performed in the area. He also surmised that a serviceman would "probably" be the one in this area for purposes of servicing the head conveyor head pulley and associated parts (Tr. 24-26). However, I find no credible evidence to support the inspector's conclusions that any work would be routinely performed at the cited location, and he apparently made no effort to contact any maintenance personnel to confirm that anyone was required to be in the area for the purposes of maintenance. As a matter of fact, he conceded that he based his "low negligence" finding on the fact that the respondent had not previously discovered the opening or that there was a problem in that area (Tr. 26).

Inspector Smiser confirmed that with the exception of doing work in the cited area, which he clearly did not determine as a fact, it was unlikely that anyone would use the "walkway" in question as a means of getting from one point to another. He confirmed that anyone venturing into the area would have to turn around and come back once reaching the end, that it was possible that any foot traffic in the area was

extremely infrequent, and that it was further possible that the reason the respondent did not discover the unprotected area could have been based on the fact that no work had been done in the area for weeks or months (Tr. 46). Although he later contradicted this testimony by stating that he would be surprised if there was no one there at least once a shift, I find no credible evidence to support this speculative conclusion.

The facts presented with respect to this citation are strikingly similar to those presented in a prior case in which an inspector issued a citation for a violation of section 57.11-12, which contained language identical to that found in section 56.11012. See: Secretary of Labor v. Magma Copper Company, 1 FMSHRC 837, 856-858 (July 1979). In that case the inspector issued a citation after finding that a chain guard which had been installed at the end of a work deck or platform was not hooked across the opening to prevent anyone from falling off the end. I vacated the citation after finding that the evidence did not establish that the infrequently travelled area in question was in fact a travelway within the meaning of the cited standard, or within the meaning of the definition of that term as found in section 57.2, which is identical to that found in section 56.2. In vacating the citation, I made the following observations at 1 FMSHRC 857-858:

I believe the intent of the standard is to protect miners, who on a regular and frequent basis, use designated travelways for movement to and from their regular duty stations or who use such travelways on a regular basis while moving in and about the mine. The facts on which this citation was issued suggest the inspector sought to protect someone working on the platform from falling through the unchained opening. Even so, the standard cited does not lend itself to the factual setting which prevailed on the day the citation issued. The standard required railings, barriers, or covers, and I fail to understand how a hooked chain can be considered as such. In the circumstances, it would appear that the standard is intended to apply to a working place rather than to a travelway, notwithstanding petitioner's assertion at page 6 of its brief that the use of a chain establishes an inference that an opening some 100 feet in the air at the edge of a platform is a travelway.

* * * If the Secretary desires to afford protection to persons working on elevated platforms, he should promulgate a safety standard covering such situations rather than attempting to rely on a loosely worded and vague standard. It seems to me that the inclusion of the term "working place" as part of section 57.11-2 would cure the problem that I have with language which I believe simply does not fit the facts presented.

In view of the foregoing, and on the facts presented in this case, I cannot conclude that the petitioner has established through any probative credible evidence that the cited location in question was near a travelway within the definition of that term found in section 5.62. Accordingly, I find no basis for finding a violation, and the citation IS VACATED.

The Significant and Substantial Violations Issue

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

With regard to Citation No. 2870013, Inspector Smiser testified that while it was unlikely that someone walking along the conveyor walkway in question would fall off to the area below if he were to trip or stumble on the accumulated rock and material, the accumulations did present a tripping or falling hazard, and that it was reasonably likely that in the event of a fall, the individual could sustain a back injury or broken limbs. If it were a serviceman who regularly walked the area, he would more than likely be carrying a grease gun or other equipment in one hand, thus increasing the likely of an injury if he were to fall or trip on the accumulations of materials which ranged in size from three-quarters of an inch to an inch and a half, and which completely covered the walkway surface and ran over the kickplate.

The respondent takes the position that the violation was not significant and substantial. In support of this conclusion, it relies on the testimony of Mr. Bales who indicated that any work being performed on the conveyor would only be done after the area was cleaned up, that no employees used the walkway as a regular means of travel from one quarry location to another, that most of the conveyor rollers can be greased from hose fittings which hung down to ground level,

and that in the past 10 years there have been no reported accidents or injuries at the quarry.

Mr. Bales confirmed that the conveyor operated 8 hours a day, 5 days a week, and that the walkway where the inspector found the accumulations of rock and materials allowed access to the conveyor for maintenance purposes. Although Mr. Bales indicated that most of the conveyor rollers were serviced from ground level, it was altogether possible that some were not, and the inspector determined that a serviceman inspecting the conveyor regularly travelled the walkway and would be exposed to a tripping or falling hazard. Under the circumstances, I agree with his finding that the cited violation was significant and substantial. Given the extent of the accumulations on the inclined conveyor walkway, and the fact that the conveyor would be operating all day, I believe that one may reasonably conclude that at least one person who would be travelling the walkway while inspecting the conveyor would be exposed to a tripping or slipping hazard, and if he were to trip or fall, it would be reasonably likely that he would suffer injuries of a reasonable serious nature. Accordingly, the inspector's "S&S" finding IS AFFIRMED.

With regard to housekeeping Citation No. 2870015, concerning the fluid spill in the concrete floor area in the crusher plant, I take note of the fact that MSHA's district manager modified the citation because of his apparent conclusion that the fluid was not combustible. Under the circumstances, I conclude and find that the fluid did not present a fire hazard. Inspector Smiser was concerned over a probable slip and fall hazard to a serviceman who he believed would be in the area to check out the crusher unit. However, the evidence establishes that the respondent had installed wooden planks and used an absorbent material in efforts to control the spillage caused by a known problem, and that the floor area in question was surrounded by handrails. Although the citation stated that the spill was large enough to cover the floor area, there is no evidence that it covered the floor planks, and Inspector Smiser conceded that the respondent installed the planks and used the absorbent material in an effort to provide safe access to the cited area in question. Mr. Bales confirmed that the spill would never run over the wooden planks. Under all of these circumstances, I conclude and find that a slip or fall would be unlikely, and the inspector's "S&S" finding IS VACATED.

With regard to Citation No. 2870016, Inspector Smiser testified that the existence of steel plates, stacked on top of each other in a "tipping" manner, and located at the top of

a staircase leading to a walkway, obstructed access to the area in that one had to step on the plates to proceed along the walkway. He also found wood and other materials such as lubricant cans on the walkway, and he concluded that all of these materials posed a slipping and falling hazard to a serviceman who would likely be using the walkway to gain access to the equipment at least once a shift. The inspector concluded that it was reasonably likely that injuries of a reasonable serious nature would result in the event someone slipped or fell while stepping over the accumulated materials in question. The respondent has advanced no credible evidence to rebut the inspector's findings, and I agree with his conclusion that the violation was significant and substantial. Accordingly, his "S&S" finding IS AFFIRMED.

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Continue in Business

Based on the stipulations by the parties, I conclude that the respondent, as a corporate operator, is a large mine operator, and that the mine in question was medium in size and scope. The parties stipulated that the payment of civil penalties for the violations in question will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

The parties stipulated that the respondent's history of prior violations consists of 10 citations issued over 40 inspection days during the 24-month period preceding the inspection conducted by Inspector Smiser. I conclude and find that the respondent has a relatively good compliance record which does not warrant any additional increases in the civil penalties which have been assessed by me for the violations which have been affirmed.

Good Faith Compliance

I conclude and find that the respondent exercised good faith in timely abating all of the violations which have been affirmed in this proceeding.

Negligence

I conclude and find that all of the violations which have been affirmed resulted from the respondent's failure to exercise reasonable care, and that they all resulted from ordinary negligence on the respondent's part.

Gravity

I conclude and find that Citation No. 2870015 concerning the fluid spillage on the floor of the crusher plant was non-serious. For the reasons stated in my "S&S" findings, I further conclude and find that Citation Nos. 2870013 and 2870016, concerning slip and fall hazards, were serious violations.

Civil Penalty Assessments

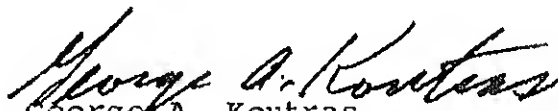
On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude that the following civil penalty assessments are reasonable and appropriate for the violations which have been affirmed:

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
2870013	03/24/87	56.20003(a)	\$ 91
2870015	03/24/87	56.20003	\$ 35
2870016	03/24/87	56.20003(a)	\$ 79

ORDER

The respondent IS ORDERED to pay the civil penalty assessments in question to MSHA within thirty (30) days of the date of this decision, and upon receipt of payment, this proceeding is dismissed.

Citation No. 2870742, March 24, 1987, citing a violation of 30 C.F.R. § 56.6112, and Citation No. 2870741, March 25, 1987, citing a violation of 30 C.F.R. § 56.11012, ARE VACATED.


George A. Koutras
Administrative Law Judge

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Mr. Robert McCormac, Industrial Relations Manager, Blue Circle
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/fb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

AUG 9 1988

GERARD SAPUNARICH, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. YORK 88-29-DM
LEHIGH PORTLAND CEMENT, CO., : MD 87-56
Respondent :
: Cementon Plant and Quarry

DECISION

Before: Judge Melick

This case is before me upon the Complaint by Gerard Sapunarich under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging that he was suspended from his job without pay by Lehigh Portland Cement, Co., (Lehigh) in violation of section 105(c)(1) of the Act.^{1/}

1/ Section 105(c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment, has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such representative of miners or applicant for employment has instituted or caused to be instituted any proceedings under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

In particular Mr. Sapunarich alleges that he was the Miner Safety Representative during relevant times and that in that capacity reported various health and safety violations from February 3, 1983, through September 11, 1987, to both officials of the Federal Mine Safety and Health Administration (MSHA) and of the mine operator. He alleges in his initial complaint that "on Friday, September 11, 1987, John Jones [plant manager] and I had a very heated discussion in the Control Room about the dust problem in the dust building that was still going on from the previous day. As a result I have been written up for insubordination and it was put in my file, also I have been suspended without pay."

In a combined Answer and Motion for Summary Decision Lehigh maintained as follows:

... Mr. Sapunarich's suspension was in no way motivated by his complaints about the dust situation. The action was taken in response to the threats and use of abusive language by Mr. Sapunarich.

The situation about which Mr. Sapunarich was complaining on the morning of September 10, 1987, was already being addressed by the Company at the time the complaint was made. The action which Mr. Sapunarich "threatened" - D.E.C. - had already been taken by the Company. Clearly, there was no reason to discipline Mr. Sapunarich for proposing to take action which the Company had already taken. The disciplinary action was directed at the threatening and abusive language used by Mr. Sapunarich. Such threats and abusive language are not protected activity. Thus, the action was lawful and non-discriminatory.

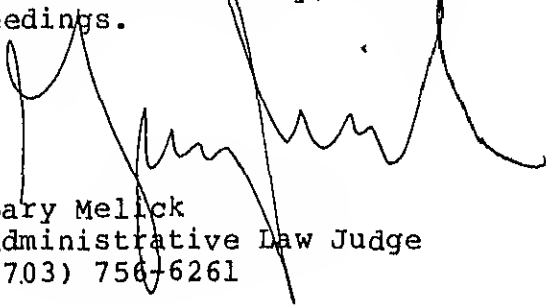
Under Commission Rule 64, 29 C.F.R. § 2700.64, a Motion for Summary Decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions and affidavits shows: (1) that there is no genuine issue as to any material facts; and (2) that the moving party is entitled to summary decision as a matter of law.

In establishing a prima facie case of discrimination under section 105(c)(1) of the Act the complainant must prove that (1) he engaged in a protected activity, and (2) the adverse action complained of was motivated in any part by that activity. Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800, (1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18, (1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. If an operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears the burden of proof with regard to the affirmative defense. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1936-38, (1982).

In support of its Motion for Summary Decision, Lehigh asserts that the alleged disciplinary action taken against Mr. Sapunarich was motivated solely by his non-protected activities. Mr. Sapunarich, on the other hand, maintains that the alleged disciplinary action was indeed motivated by his protected activities. There clearly remains then a genuine issue concerning a material fact in this case (i.e. the motivation for the alleged disciplinary action) and, accordingly, the Motion for Summary Decision cannot be granted. 29 C.F.R. § 2700.64.

ORDER

The Motion for Summary Decision filed by Lehigh Portland Cement Company is denied. The hearings scheduled in this case to commence on August 31, 1988, will accordingly proceed as scheduled. The parties are advised that these hearings are de novo and that any evidence to be considered by the undersigned, both testimonial and documentary, must be proffered during those proceedings.



Gary Mellick
Administrative Law Judge
(703) 756-6261

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 12 1988

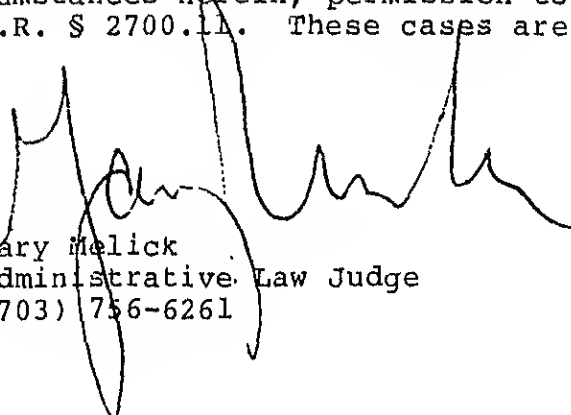
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 88-57-D
on behalf of	:	BARB CD 87-46
ELLIOTT ROWE, JR.,	:	
AGNEL AMBURGEY,	:	Docket No. KENT 88-58-D
EVERETT WATKINS,	:	BARB CD 87-47
EDSEL BAKER,	:	
CALVIN BAKER,	:	Docket No. KENT 88-59-D
Complainants	:	BARB CD 87-48
	:	
v.	:	Docket No. KENT 88-60-D
	:	BARB CD 87-50
JOHNSON COAL COMPANY,	:	
INCORPORATED,	:	Docket No. KENT 88-61-D
Respondent	:	BARB CD 87-49
	:	
	:	No. 11 Mine

ORDER OF DISMISSAL

Appearances: Michael L. Roden, Esq., Office of the
Solicitor, U.S. Department of Labor for
Complainants;
Paul R. Collins, Esq., Nancy M. Collins, Esq.,
Hollon, Hollon, Hollon, Hazard, Kentucky;
Tony Oppeward, Esq., Appalachian Research and
Defense Fund of Kentucky, Hazard, Kentucky,
Intervenor.

Before: Judge Melick

The Complainants herein have, in substance, requested approval to withdraw their respective complaints in the captioned cases for the reason that they have reached agreed settlements. Under the circumstances herein, permission to withdraw is granted. 29 C.F.R. § 2700.11. These cases are therefore dismissed.


Gary Melick
Administrative Law Judge
(703) 756-6261

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 16 1988

JOSEPH STORA,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. WEVA 88-96-D
v.	:	MORG CD 88-4
	:	
SOUTHERN OHIO COAL COMPANY,	:	Raccoon No. 3 Mine
Respondent	:	

DECISION

Before: Judge Maurer

On October 27, 1987, the Complainant, Joseph Stora, filed a complaint of discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (hereinafter referred to as the "Act") with the Secretary of Labor, Mine Safety and Health Administration (MSHA) against the Southern Ohio Coal Company (SOCCO). That complaint was denied by MSHA and Mr. Stora thereafter filed a complaint of discrimination with the Commission on his own behalf under section 105 (c)(3) of the Act. Mr. Stora alleges that he was discriminated against in violation of section 105(c) of the Act because he was discharged on August 28, 1987, by SOCCO for proceeding under unsupported top while other persons are known by management to go out under unsupported top and are not discharged. He goes on to state that the other reason he was given for his discharge was a "continuous pattern of unsatisfactory work." He admits proceeding under the unsupported roof on the cited occasion but denies the "continuous pattern of unsatisfactory work."

SOCCO, by counsel, has moved to dismiss the subject complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted under section 105(c) of the Act. On June 22, 1988, an ORDER TO SHOW CAUSE was issued by the undersigned wherein the Complainant was ordered to show cause within fifteen (15) days as to why this proceeding should not be dismissed for "failure to state a claim for which relief can be granted under section 105(c)(1) of the Act." There has been no response received to date.

For the purposes of ruling on SOCCO's motion to dismiss, the well pleaded material allegations of the complaint are taken as admitted. 2A Moore's Federal Practice ¶12.08. A complaint should not be dismissed for insufficiency unless it appears to a certainty that the complainant is entitled to no relief under any

state of facts which could be proved in support of a claim. Pleadings are, moreover, to be liberally construed and mere vagueness or lack of detail is not grounds for a motion to dismiss. Id.

Section 105(c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such representative of miners or applicant for employment has instituted or caused to be instituted any proceedings under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

In order to establish a prima facie violation of section 105(c)(1) the Complainant must prove that he engaged in an activity protected by that section and that his discharge was motivated in any part by that protected activity. Secretary ex. rel. David Pasula v. Consolidation Coal Company, 2 FMSHRC 2786 (1980) rev'd on other grounds, sub nom, Consolidation Coal Company v. Secretary, 633 F 2d. 1211(3rd Cir. 1981). In this case, Mr. Stora asserts that he was discharged for going beyond supported top while other persons are known by management to have engaged in similar unsupported top infractions and were not discharged. Assuming that this allegation is true, it is clearly not sufficient to create a claim under section 105(c)(1) of the Act. That section does not provide a remedy for what the Complainant perceives to be "discrimination" but what is in reality, at best, unfairness or inequitable treatment; if that conduct on the part of the operator was not caused in any part by an activity protected by the Act. Violating the federal mining regulations is not activity protected by the Act. Therefore, I find that the complaint herein fails to state a claim for which relief can be

granted under section 105(c)(1) of the Act, and this case is therefore dismissed.

A handwritten signature in black ink, appearing to read "Roy J. Maurer". The signature is fluid and cursive, with the first name "Roy" and last name "Maurer" clearly distinguishable.

Roy J. Maurer
Administrative Law Judge

Distribution:

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(Certified Mail)

David A. Laing, Esq., Porter, Wright, Morris & Arthur, 41 South
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 17 1988

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 88-4-M
Petitioner	:	A.C. No. 23-00188-05524
v.	:	
	:	Docket No. CENT 88-5-M
RIVER CEMENT COMPANY,	:	A.C. No. 23-00188-05525
Respondent	:	
	:	Docket No. CENT 88-6-M
	:	A.C. No. 23-00188-05526
	:	
	:	Selma Plant Quarry and Mill

DECISION

Appearances: Tobias B. Fritz, Esq., U.S. Department of Labor, Office of the Solicitor, Kansas City, Missouri, for the Petitioner; Bradley S. Hiles, Esq., and, JoAnne Levy Saboeiro, Esq., Peper, Martin, Jensen, Maichel and Hetlage, St. Louis, Missouri, for the Respondent

Before: Judge Maurer

STATEMENT OF THE CASE

These civil penalty proceedings concern proposals for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a). The petitioner initially sought civil penalty assessments for five alleged violations of certain mandatory safety standards found in Part 56 of Title 30, Code of Federal Regulations.

Pursuant to notice, the cases were heard in St. Louis, Missouri on March 29, 1988. At the beginning of that hearing, I approved the vacation by the petitioner of Citation No. 2870962 and the settlement without reduction in penalty of Citation No. 2870467. That left one § 104(a) citation remaining in each of the three above-styled cases to be heard and decided. The parties filed post-hearing arguments and proposed findings which I have considered in the course of making and writing this decision.

STIPULATIONS

The parties stipulated to the following:

1. Respondent is subject to the Federal Mine Safety and Health Act of 1977.
2. Respondent operates the Selma Plant Quarry and Mill, where 347,550 hours were worked during calendar year 1986.
3. Respondent has paid 14 violations in 99 inspection days in the 24-month period preceeding February 1987.
4. Respondent would not be adversely affected by the payment of the proposed civil penalties.

ISSUES

The primary issues presented are: (1) whether the conditions or practices cited constitute violations of the cited mandatory standards, and (2) the appropriate civil penalties to be assessed for the violations, should any be found, taking into account the statutory civil penalty criteria found in section 110(i) of the Act.

DISCUSSION WITH FINDINGS

I. DOCKET NO. CENT 88-4-M

Section 104(a) Citation No. 2870494, which is the subject of this proceeding, was issued by an MSHA inspector on February 26, 1987. The citation alleges a violation of the mandatory safety standard found at 30 C.F.R. § 56.9087 and the condition or practice alleged by the inspector to be a violation of that standard states as follows:

The Bobcat FEL #1187 was not equipped with a reverse signal alarm. This loader has restricted view to the rear and operates in the entire mill area. The vehicle was not being used on this shift.

30 C.F.R. § 56.9087 provides in its entirety as follows:

Heavy duty mobile equipment shall be provided with audible warning devices. When the operator of such equipment has an obstructed view to the rear, the equipment shall have either an automatic reverse signal alarm which is audible above the surrounding noise level or an observer to signal when it is safe to back up.

Respondent admitted that the front end loader, number 1187, was not equipped with an operational automatic reverse signal alarm on February 26, 1987, and that the equipment was available for use by its employees on that date.

At the conclusion of the Secretary's case, I granted respondent's motion to vacate the citation and dismiss the case based on the fact that the Secretary had not proffered any evidence that the Bobcat was operated in violation of the cited standard on February 26, 1987, or indeed any other prior date certain.

Since the citation did not specifically allege any other prior date, I found the relevant date to be February 26, 1987, as that was the date contained in Section I-Violation Data on Petitioner's Exhibit No. 1, which is Citation No. 2870494. Therefore, I held that the Secretary must prove that the violations occurred on that date, which she could not do. In fact, at the close of the Secretary's case concerning this citation, it became evident that she could not prove that a violation of the cited standard occurred on any particular day, before, on or even after February 26, 1987.

The cited standard gives the operator the option to operate the equipment without an automatic reverse signal alarm if they utilize an observer to signal when it is safe to back up. When Inspector Ryan testified he was asked what the basis was for his belief that the operator had used this equipment without an observer. He replied "[a]t this time, sir, the best thing I can tell you would be instinct."

The Secretary's next witness, Mr. Wagner, who is a former employee of the respondent, did better than that, but he too was unable to identify any specific instance or date when he operated the Bobcat in violation of the cited standard although he testified that he had done so many times.

The Secretary argues that at unspecified occasions and times prior to the date of the citation, the respondent violated the cited standard because they had a general policy of not providing an observer while operating the Bobcat in reverse. This argument overlooks the fact that this particular standard does not speak to company policy, but rather requires evidence of discrete violations of its terms, including the alternative method of compliance.

I have again searched the record herein and am unable to locate any specific evidence of a date, time and place when the respondent was in noncompliance with the standard and I find that

in order to have made a prima facie case of a violation the Secretary must have produced some evidence that the respondent was operating this equipment without a reverse signal alarm or an observer at some definite time or at least some date certain. To hold otherwise would force the respondent to prove the negative, i.e., that it did not operate the equipment in violation of the standard on any day since it was first acquired, which was years before the citation was written. Therefore, I conclude that Citation No. 2870494 was properly vacated at the close of the petitioner's evidence pursuant to the Federal Rules of Civil Procedure (F.R.C.P. 41(b)).

II. DOCKET NO. CENT 88-5-M

Section 104(a) Citation No. 2870470, which is the subject of this proceeding, was issued on February 25, 1987. The citation alleges a violation of the mandatory standard found at 30 C.F.R. § 56.16003 and the condition or practice alleged by the inspector to be a violation of that standard states as follows:

A 55 gallon barrel of tannergas was stored alongside the maintenance shop.

30 C.F.R. § 56.16003 provides in its entirety as follows:

Materials that can create hazards if accidentally liberated from their containers shall be stored in a manner that minimizes the dangers.

Inspector Wilson issued the subject citation because he observed a barrel of tannergas 1/ stored outside the respondent's maintenance shop and was concerned that there could be an explosion if fumes got into the shop should there be any accidental liberation of the substance and ignition from welding or grinding sparks occurred. He testified that the substance could be accidentally liberated by a vehicle running into it and rupturing the drum, or if it was knocked off the rack, its valve could rupture. He further testified that employees periodically filling other containers with the tannergas could have incidental spillage occur.

During cross-examination, however, the inspector was obviously not very conversant with the particulars of why this particular storage was hazardous, if it was. He readily admitted that at the time of his inspection, he did not know what tannergas was, did not physically inspect it, did not know its

1/ Tannergas is a flammable liquid antifreeze used in compressed air lines.

evaporation rate or indeed even if it existed in vaporous form. Furthermore, he opined that of all the ways he could possibly think of for the tannergas to have been accidentally liberated in its original location all were probably unlikely to occur.

To rebut what nominally could be considered a prima facie case for a violation of the cited standard, the respondent called Mr. John Jurgiel, a certified industrial hygienist, as an expert witness. Mr. Jurgiel agreed with the inspector that based on his observations of the area where the tannergas was stored at the time the citation was written, accidental liberation of the tannergas was unlikely. He further testified that in his opinion even if a spill occurred outside the shop it was almost impossible for the tannergas vapors to enter the maintenance shop, travel the 75 feet to the welding area, and concentrate at the lower explosive limit of six percent, meaning that the tannergas vapor must comprise six percent by volume of the air to be explosive. Mr. Jurgiel therefore concluded that the storage of the tannergas drum outside the maintenance shop was a "no hazard" situation, presenting no likelihood of danger to the health or safety of the employees.

Interestingly, the inspector required and approved an abatement site for the storage of the tannergas which is contrary to the instructions on the material safety data sheet (MSDS) for tannergas. The data sheet specifically states "do not store in open sunlight." For this reason, Mr. Jurgiel believes that the original, cited location was better than the abatement site where the tannergas is now located in the sun, notwithstanding the contrary warning on the MSDS.

I conclude that the preponderance of reliable, probative evidence in the record does not establish that the tannergas was stored in an unsafe manner and to the contrary I find that it was stored in a manner that minimized the danger of explosion, at least in comparison to its present, approved location. Therefore, it follows that I find no violation of the cited mandatory standard.

III. DOCKET NO. CENT 88-6-M

Section 104(a) Citation No. 2870466, which is the subject of this proceeding, was issued on February 24, 1987. The citation alleges a violation of the mandatory standard found at 30 C.F.R. § 56.14045 and the condition or practice alleged by the inspector to be a violation of that standard states as follows:

Welding operations in the shop were not ventilated.

30 C.F.R. § 56.14045 provides in its entirety as follows:

Welding operations shall be shielded and well ventilated.

Inspector Wilson personally observed a welding operation in the respondent's shop on February 24, 1987. He testified he observed a welder "hard surfacing" a piece of equipment and the smoke coming off that welding rod was spreading throughout the shop area. To the best of his recollection, there was no air movement in the shop at the time this "hard surface" welding was taking place. This condition most likely existed at that time because all the doors in the maintenance shop were closed and the ventilation fans were not operating. Subsequent testimony established that it was company policy on cold days to operate the ventilation system only intermittently. If someone noticed welding fumes building up, they would turn on the fans and open the doors, which was apparently sufficient to dissipate the smoke and fumes.

This violation, however, is not about the sufficiency of the ventilation system, which everyone agrees was not even in use at the time. Rather, the violation was completed if the inspector observed even a single discrete welding operation which was not well ventilated. The uncontradicted evidence is that he in fact did personally observe such an operation and I find that evidence to be credible, and entirely consistent with the fact that the ventilation fans were not in operation and all the doors were closed. Not an unlikely configuration in February in Missouri, but nonetheless one that caused a violative accumulation of smoke and fumes. Therefore, I find that a violation of 30 C.F.R. § 56.14045 has been established, as alleged.

A "significant and substantial" violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum the Secretary of

Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

We have explained further that the third element of the Mathies formula 'requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury.' U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The hazard involved in this particular violation is the accumulation of unhealthful concentrations of fumes and/or smoke. The inspector did not have any specific information concerning actual exposure levels in the shop since he did not collect any air samples from the respondent's shop. The Secretary also put on evidence from a health specialist with some knowledge of welding that chromium, manganese and iron oxide fumes are almost always present when you have hard surface welding going on. He further testified that beyond some ceiling value (the TLV), these materials can be harmful. However, he had not analyzed any air samples pertaining to welding fume concentrations in the respondent's shop, but rather was testifying in a general manner about hard surface welding and overexposure to hazardous materials.

Once again, Mr. Jurgiel, an industrial hygienist hired by the respondent, went the extra mile. He collected several air samples in the shop under conditions simulating the welding observed by Inspector Wilson. More specifically, he arranged to have an employee hard surface weld continuously for one hour with the maintenance shop doors closed and the ventilation fans off. These air samples were then turned over to an accredited industrial laboratory where chemical analysis showed the exposure to the potentially hazardous components of the welding rods to be substantially below the threshold limit values (the TLVs) for those elements. Mr. Jurgiel therefore concluded, with some

scientific basis, that there was no health hazard posed for the welder or other persons in the shop, at the concentrations of smoke and fumes observed by Inspector Wilson.


I find the results of Mr. Jurgiel's air sampling tests and the subsequent chemical analysis of the air filters by an atomic absorption spectrophotometer to be credible and therefore conclude that the violation was not "significant and substantial" and will affirm the citation on that basis.

CIVIL PENALTY ASSESSMENT

In assessing a civil penalty herein, I find and conclude that this violation resulted from moderate negligence as marked on Petitioner's Exhibit No. 8 and that any injury or illness resulting from this violation was unlikely. I have also considered all the foregoing findings and conclusions made in the course of this decision and the requirements of section 110(i) of the Act. Under these circumstances, I find that a civil penalty of \$50 is appropriate in this case.

ORDER

1. Citation No. 2870962 is vacated.
2. Citation No. 2870467 is affirmed and a penalty of \$20 is assessed.
3. Citation No. 2870494 is vacated.
4. Citation No. 2870470 is vacated.
5. Citation No. 2870466 is affirmed as a "non-S&S" citation and a penalty of \$50 is assessed.
6. Respondent is ordered to pay to the Secretary the sum of \$70 within 30 days of the date of this decision.


Roy J. Maurer
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

AUG 17 1988

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. LAKE 88-4-M
Petitioner	:	A.C. No. 11-02780-05506
v.	:	
	:	Docket No. LAKE 87-85-M
OZARK-MAHONING COMPANY,	:	A.C. No. 11-02780-05504
Respondent	:	
	:	Annabel Lee Mine
	:	
	:	Docket No. LAKE 88-22-M
	:	A.C. No. 11-02667-05505
	:	
	:	Denton Mine

DECISIONS

Appearances: Miguel J. Carmona, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for the Petitioner; Thomas M. Dowling, Safety and Industrial Relations Manager, and Vic A. Evans, General Manager, Ozark-Mahoning Company, Rosiclare, Illinois, for the Respondent.

Before: Judge Koutras

Statement of the Proceedings

These proceedings concern civil penalty proposals filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(a), seeking civil penalty assessments for eight alleged violations of MSHA's mandatory noise standards found in Part 57, and the injury reporting standards found in Part 50, Title 30, Code of Federal Regulations.

The respondent contested the citations and proposed civil penalty assessments, and pursuant to notice served on the parties, hearings were held in Evansville, Indiana. The parties filed posthearing briefs, and I have considered the

arguments made therein in the course of my adjudication of these cases.

Issues

The issues presented in these proceedings are as follows:

1. Whether the respondent violated the cited mandatory safety standards, and if so, the appropriate civil penalties to be assessed for the violations based on the criteria found in section 110(i) of the Act.

2. Whether the inspector's "significant and substantial" (S&S) finding concerning one noise citation violation is supportable.

3. Additional issues raised by the parties in this proceeding are identified and disposed of in the course of these decisions.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, Pub. L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 20 C.F.R. § 2700.1 et seq.

Stipulations

The parties stipulated to the following (Exhibit P-R-1):

1. Ozark-Mahoning Company, a Delaware Corporation, is the owner and operator of the Denton and Annabel Lee Mines located in the state of Illinois and the county of Hardin.

2. The mines operated by Ozark-Mahoning Company are subject to the Federal Mine Safety and Health Act of 1977 as it relates to 30 C.F.R. Part 57 for metal and nonmetal mining and milling operations.

3. The Denton Mine is classified under the Act as a small mine having accumulated a

total of 35,136 work hours in the preceding calendar year.

4. The Annabel Lee Mine is classified under the Act as a small mine having accumulated a total of 53,131 work hours in the preceding calendar year.

5. On May 27, 1987 at 2:00 p.m., MSHA Inspector Jerry Spruell issued Citation No. 2865780 to Ozark-Mahoning for an alleged violation of 30 C.F.R. § 50.20.

6. On May 27, 1987 at or near 3:00 p.m., MSHA Inspector James Bagley issued Citation Nos. 2865757, 2865758 and 2863759 for alleged violations of 30 C.F.R. § 57.5050(b).

7. On May 27, 1987, MSHA Inspector Jerry Spruell issued Citation Nos. 2865785, 3059584 and 3059585 for alleged violations of 30 C.F.R. § 57.5050(b). Citation No. 2865785 was issued for an alleged violation of 30 C.F.R. § 57.5050.

8. Pursuant to the provisions of section 110(a) of the Federal Mine Safety and Health Act Ozark-Mahoning Company posted Notices of Contest and requested hearings in the matter of alleged violations of 30 C.F.R. § 50.20 and 30 C.F.R. § 57.5050(b) as issued by Citation Nos. 2865780, 2865757, 2865758, 2863759, 2865785, 3059584 and 3059585.

9. During the preceding year Ozark-Mahoning Company's Mining Division accumulated a total of 238,015 hours worked for all its reportable locations covered under the Mine Safety and Health Act of 1977 as it relates to 30 C.F.R. Part 57 for metal and nonmetal mining and milling operations.

10. Payments as originally proposed for the alleged violations in this matter will not adversely affect the operator's ability to remain in business.

Discussion

The citations in issue in these proceedings are as follows:

Docket No. LAKE 88-4-M

Section 104(a) non-"S&S" Citation No. 2865757, May 28, 1987, cites a violation of 30 C.F.R. § 57.5050(b), and the condition or practice is stated as follows (Exhibit P-6):

The full shift exposure to mixed noise levels of the No. 1 Haulage Truck operator exceeded unity (100%) by 4.25 Times (425%) as measured with a dosimeter. This is equivalent to an 8-hour exposure to 100.3 dBA. Personal hearing protection was being worn. Feasible engineering controls were not being used to reduce the noise exposure to permissible units.

Section 104(a) non-"S&S" Citation No. 2865758, May 28, 1987, cites a violation of 30 C.F.R. § 57.5050(b), and the condition or practice is stated as follows (Exhibit P-7):

The full shift exposure to mixed noise levels of the No. 2 Haulage Truck operator exceeded unity (100%) by 3.65 times (365%) as measured with a dosimeter. This is equivalent to an 8-hour exposure to 99.3 dBA. Personal hearing protection was being worn. Feasible engineering controls were not being used to reduce the noise exposure to permissible units.

Section 104(a) non-"S&S" Citation No. 2865759, May 28, 1987, cites a violation of 30 C.F.R. § 57.5050(b), and the condition or practice is stated as follows (Exhibit P-8):

The full shift exposure to mixed noise levels of the Front-end Loader, operating in the south end of the mine (Miller's Ridge), exceeded unity (100%) by 2.96 (296%) as measured with a dosimeter. This is equivalent to an 8-hour exposure to 97.7 dBA. Personal hearing protection was being worn. Feasible engineering controls were not being used to reduce the noise exposure to permissible units.

Section 104(a) "S&S" Citation No. 2865785, May 28, 1987, cites a violation of 30 C.F.R. § 57.5050, and the condition or practice is stated as follows (Exhibit P-5):

The full shift exposure to mixed noise levels of the jumbo drill operator exceeded unity (100%) by 18.67 times (1867%) as measured with a dosimeter. This is equivalent to an 8-hour exposure to 111 dBA. Personal hearing protection was being worn. This drill operator was exposed to continuous noise, when both drills were being used, at 118 dBA level, measured at the operator's ear with a sound level meter, on this date. The left drill was not nullified and the right drill exhausted toward the operator.

The respondent asserted that it has previously paid the civil penalty assessment of \$20 for section 104(a) non-"S&S" Citation No. 2865784, issued on May 28, 1987, for a violation of 30 C.F.R. § 57.5050, and no longer wishes to contest this citation. Petitioner's counsel agreed that this was the case (Tr. 143-147).

Docket No. LAKE 88-22-M

Section 104(a) non-"S&S" Citation No. 3059584, issued on June 17, 1987, cites a violation of 30 C.F.R. § 57.5050(b), and the condition or practice states as follows (Exhibit P-9):

The full shift exposure to mixed noise levels of the Wagner 2B loader operator working underground exceeded unity (100%) by 1.583 times (158.3%) as measured with a dosimeter. Personal hearing protection was being worn. This exposure is equivalent to an 8-hour exposure to 93 dBA.

Section 104(a) non-"S&S" Citation No. 3059585, issued on June 17, 1987, cites a violation of 30 C.F.R. § 57.5050(b), and the condition or practice states as follows (Exhibit P-10):

The full shift exposure to mixed noise levels of the operator of the loader (Scoop #2) working underground exceeded unity (100%) by 3.04 times (304%) as measured with a dosimeter. Personal hearing protection was being worn. This exposure is equivalent to an 8-hour exposure to 98 dBA.

Section 104(a) non-"S&S" Citation No. 2865780, May 27, 1987, cites a violation of 30 C.F.R. § 50.20, and the condition or practice is stated as follows (Exhibit P-1):

A lost time injury accident occurred at this property on 4-30-87. A 7000-1 form, report of accident or injury, had not been submitted to MSHA as required. The employee injured was not worked on 5-1-87 due to the accident.

MSHA's Testimony and Evidence Concerning the Accident Reporting Citation-Docket No. LAKE 87-85-M

MSHA Inspector Jerry L. Spruell testified as to his training and experience, and he confirmed that he conducted an inspection on May 27, 1987, with fellow Inspector James Bagley, and upon requesting to look at any mine records relating to accidents in the mine, management produced records which showed that a lost time injury accident had occurred and that an employee had missed 1 day of work because of that accident. Since an MSHA Form No. 7000-1, had not been submitted as required by section 50.20, he issued the citation. The company records he reviewed indicated that the employee was involved in an "injury" and missed 1 day of work and was not able to perform his regular duties because of being overcome by hydrogen sulfide gas. Mr. Spruell confirmed that the records did not show that the employee was involved in an "accident" (Tr. 9-16).

Mr. Spruell confirmed that at the time he issued the citation he was not aware that the employee received any medical treatment. After speaking with the employee he told him that he was unable to work on May 1, 1987, "because he was blind and couldn't see to run his drill," and was unable to work because "he couldn't see to do the job safely." The employee also told him that he had visited a doctor and that the doctor told him he did not want him exposed "to the gas at the high level like that at that short period of time without a recovery time" (Tr. 17).

Mr. Spruell believed that the respondent was familiar with MSHA's injury reporting requirements because it has the forms and the instructions which are on the front cover. Mr. Spruell confirmed that he made a gravity finding of "unlikely" because the failure to report the injury would not

cause an injury or illness, and he found "lost days or restricted duty" because the employee had an injury that resulted in a lost day. He also confirmed that he made a negligence finding of "moderate" because the office person who fills out the report advised him that she was not aware of the fact that lost time injuries had to be reported. Mr. Spruell abated the citation that same day after the person filled out a reporting form (Tr. 18).

Inspector Spruell confirmed that he based his citation on certain documents which were given to him by mine management during his inspection. A supervisor's Report of Accident shows that the employee lost 1 day of work on May 1, 1987 (Exhibit P-2-a). A worker's compensation form filed by the respondent reflects that the incident concerning the employee was a "lost work day case" (Exhibit P-2-b); (Tr. 20-23).

On cross-examination, Mr. Spruell confirmed that except for the violation in question, the respondent's other records were reasonably kept and the respondent made a reasonable attempt to keep them up to date. He did not believe that any of the respondent's employees were conspiring to "cover up" the injury report in question (Tr. 24).

Mr. Spruell confirmed that he has been trained in the effects of hydrogen sulfide gas, and while it affects individuals differently, the normal result of exposure to the gas results in eye irritation to anyone who has been exposed to high gas levels (Tr. 26). He also confirmed that the supervisor's report reflects the time of the injury as "all day," and this would indicate that the employee worked all day (Tr. 34).

Mr. Spruell stated that he was familiar with MSHA Information Bulletin 86-6C, 86-3M (Exhibit R-1), and he denied that the respondent's accountant, Mrs. Spivey, told him that she used this bulletin in filling out injury and accident forms (Tr. 37). Mr. Spruell made reference to a certain information contained in the bulletin which requires the reporting of a "doubtful" injury (Tr. 40).

In response to further questions, Mr. Spruell stated that it was his understanding that the employee worked his whole shift and went to a doctor after the shift (Tr. 46).

Mr. Spruell stated that the employee in question, Joseph Clanton, did not contact him or his office with regard to his eye injury, and that he did not go to the mine to specifically look for any report incident to Mr. Clanton's eye condition.

Mr. Spruell confirmed that his citation was issued solely on the basis of the records that the respondent showed him, and that he was not aware of Mr. Clanton's injury prior to the inspection (Tr. 72-73). Mr. Spruell was made aware of the fact that another MSHA inspector was at the mine on May 1, making gas readings, but this inspector was not looking into the injury reporting situation (Tr. 73).

Mr. Spruell reaffirmed the fact that he issued the citation because of the respondent's injury report and the worker's compensation form which indicated that the employee missed 1 day of work because of gas exposure to his eyes (Tr. 106-107). Based on this information, he concluded that the lost day of work was a direct result of the injury, and all lost time injuries must be reported. He agreed that if the employee simply decided to take a day off for a reason other than an injury, then it would not have to be reported (Tr. 108-109).

Joseph Clanton, confirmed that he is employed by the respondent as a drillman, and that he worked his shift on April 30, 1987. After coming to the surface at the end of his shift, his eyes were exposed to the light, and he stated that "I was blinded. I was in extreme pain, excruciating pain." He stated that he was angry, and was exposed to the same condition 2-days prior to April 30, and that he told the secretary and the mine superintendent "that when they got that place straightened out, fit to work in, I'd be back." He confirmed that he intended to stay off "until they got this condition abated" (Tr. 50-51).

Mr. Clanton stated that he attempted to drive home as he had done the previous two evenings, but after driving 5 miles he stopped at a friend's house and asked to be taken to a doctor. Mr. Clanton stated that he blindfolded himself, and after it was dark he was able to see. After arriving at the doctor's office, he was directed to the emergency room where his eyes were flushed out with sterile water. The doctor examined him and put some salve in his eyes and gave him the rest of it to use. The next morning his eyes "scabbed over a little bit, but they cleared up" (Tr. 54-55). Mine Superintendent Pilcher called him, and Mr. Clanton advised him that he did not care to come to work that day because he did not want to be exposed to the gas again (Tr. 55).

Mr. Clanton stated that after visiting the doctor on Thursday, April 30, the doctor told him "you better not work tomorrow," referring to Friday, May 1, 1987. The doctor did not order him a prescription other than the tube of ointment

which he gave him, and Mr. Clanton could not identify that medication. The ointment "made it hurt a little worse. But, it cleared up over night" (Tr. 56-58). Mr. Clanton was shown copies of the doctor's statements, (Exhibit P-3-a, b, c), and he confirmed that he had not previously seen these reports (Tr. 57). Mr. Clanton confirmed that he did not work on May 1, 1987, and that he was not paid workmen's compensation that day because he was not eligible for it (Tr. 63).

Mr. Clanton could not remember the doctor instructing him to return to the clinic on May 5, 1987, as stated in his report (Exhibit P-3-a), but that he did return the next morning on May 1, 1987, and that on that day his vision was intact and his eyes were clear as stated in the doctor's report. However, his eyes "still hurt a little bit," and he had to wear sun glasses which he had purchased (Tr. 64-65).

Mr. Clanton stated that while he was able to return to work on Friday, May 1, he was unwilling to do so, and that he informed Mr. Pilcher that he would not be back "until he got the air cleared up." Mr. Clanton stated that he would not have returned to work that day even if the doctor had told him to (Tr. 65-66). He returned to work on Saturday, May 2, and worked in another area of the mine "where the good air was at," and was paid overtime (Tr. 66, Exhibit R-2). He confirmed that he has walked off the job on one prior occasion without notifying his supervisor (Tr. 68).

Respondent's Testimony and Evidence

Daniel Pilcher, respondent's mine superintendent, testified as to his experience, background, and education, and he confirmed that the mine air is monitored constantly by the respondent, as well as Federal and State inspectors when they are at the mine for inspections. In addition, mine employees are trained to recognize the hazards associated with hydrogen sulfide gas which is normally liberated by entrapped water. Measures are taken to exhaust the gas and to insure adequate ventilation to remove it (Tr. 77-81).

Mr. Pilcher confirmed that he has reviewed the doctor's report which indicated that Mr. Clanton's eyes were clear and his vision intact the day after his injury. He had not seen the report when he spoke with Mr. Clanton that day, and Mr. Clanton led him to believe that the doctor did not think he should work that day (Tr. 82).

Mr. Pilcher stated that Mr. Clanton has walked off the job on two separate occasions without notifying anyone, and he was reprimanded for this (Tr. 85-86, Exhibit R-3).

On cross-examination, Mr. Pilcher confirmed that he was familiar with MSHA's reporting procedures, and according to the guidelines if there is "a serious question" or doubt concerning an injury, it will be reported. If the respondent is sure of its status, it will not be reported. Mr. Pilcher agreed that the doctor's report, (Exhibit P-3-a) states that Mr. Clanton could return to work on May 2, 1987, but "as far as we are concerned, that is not reportable." With regard to "a first aid case" where an employee loses a day of work, Mr. Pilcher believed it was a matter of judgment as to whether it had to be reported, and that in Mr. Clanton's case it was a first aid case, rather than a medical treatment case. In short, Mr. Pilcher believed that the regulation is not clear as to whether a first aid case is required to be reported (Tr. 91-93).

Mr. Pilcher confirmed that the doctor's report was presented well after the issuance of the citation and that the information he had available as to whether Mr. Clanton was able to return to work on Friday, May 1, 1987, was the conversation that he had with him that day during which Mr. Clanton informed him that he did not want to work in the same area and wanted to work elsewhere. Mr. Pilcher stated that he informed Mr. Clanton that this was not an option. Mr. Pilcher stated that he came to the conclusion that Mr. Clanton did not want to return "because he didn't want to return" and not because of any gas exposure. In support of this conclusion, Mr. Pilcher stated that two other individuals working within a few feet of Mr. Clanton did not believe the gas was bad enough to see a doctor (Tr. 100).

Thomas M. Dowling, respondent's Safety and Industrial Relations Inspector, confirmed that the filing of accident forms with MSHA is his responsibility and that the forms are kept in his office. He also confirmed that he is familiar with MSHA's accident reporting bulletin and that he uses it as a guide for the preparation of the reports. He stated that no report was filed in Mr. Clanton's case because it did not appear to be a lost time accident which met MSHA's criteria guidelines. He believed that a first aid situation establishes a "doubtful case" under the guidelines, and that there was no attempt to hide anything from MSHA, nor was it an oversight. He stated that based on MSHA's available criteria, "we did what we thought was right" (Tr. 115-117).

On cross-examination, Mr. Dowling confirmed that worker's compensation reports are filed in any accident or injury situation that requires medical treatment or first aid, even in cases of no lost work days. This is done so that payment of the medical services may be obtained (Tr. 119-120). When asked why the forms which were filed in Mr. Clanton's case reflect "one lost day," Mr. Dowling responded "I don't rightly know at this time" (Tr. 121).

Mr. Dowling conceded that taking the position that Mr. Clanton lost a day of work for worker's compensation purposes, but not for MSHA's reporting requirements, was contradictory (Tr. 122). The discussions with Mrs. Spivey as to whether the incident had to be reported to MSHA took place the week following the incident, but Mr. Dowling could not recall whether he discussed with Mrs. Spivey whether or not a report should be filed. The decision was probably made after the doctor's report was received, and Mr. Dowling concluded that it was a first aid case since no charges were received from the doctor for any prescription medication, and he probably instructed Mrs. Spivey not to file any report (Tr. 124-129).

Mr. Dowling stated that he did not speak to the doctor concerning Mr. Clanton's case, and that the letter received from the doctor on June 19, 1987, was obtained to enforce his belief that there was some reasonable doubt, and to support the respondent's defense to the contested citation (Tr. 130).

Mr. Dowling confirmed that Mr. Clanton worked in a different mine area when he returned to work on Saturday, May 2, because there was no activity in the area where he had previously worked on April 30, and all employees are given the option to do other work when they work on Saturdays (Tr. 131).

Inspector Spruell was called by the respondent, and he confirmed that he had a conversation with Mr. Evans during which he advised Mr. Evans that Mr. Clanton could not be moved from a work area where he was experiencing a problem with gas in order to avoid lost time because this would be considered "restricted duty" which would have to be reported (Tr. 132-134).

MSHA's Testimony and Evidence concerning the Noise Citations-Dockets LAKE 88-4-M and LAKE 88-22-M

MSHA Inspector Jerry L. Spruell confirmed that all of the noise citations in these proceedings were issued after inspections at the mines, which included noise surveys taken in connection with the cited equipment operator occupations, and

mine management was informed of the inspections and surveys. Mr. Spruell confirmed that he issued Citation No. 2865785, after finding a muffler missing from one of the drill mechanisms mounted on the front of a two-boom jumbo drill. The drill operator was prepared for the noise survey at the start of his work shift, and a sound level meter test indicated that he was constantly exposed to noise levels above 115 dBA, and that is why he cited a violation of section 57.5050. Although the drill operator was wearing hearing protection, he was not wearing it at all times, and Mr. Spruell stated that he observed him on the drill without his hearing protective muff in place.

Mr. Spruell stated that one of the drills was equipped with a muffler, and the other was not. He considered the muffler to be a feasible engineering control which reduced the level of noise exposure to the operator. He explained that the exposure level of 111 decibels as stated in the citation was the average noise exposure for the drill operator over his full work shift, and that the 118 decibels indicated a continuous noise exposure level as measured with a sound level meter. He confirmed that the equipment operators were "hooked up" for the noise survey before they went underground, and that the testing devices were removed when they came to the surface after their work shift. He also confirmed that the maximum allowable noise exposure pursuant to section 57.5050 is 90 decibels over an 8-hour work shift, and 115 decibels for any particular time (Tr. 149-155). Mr. Spruell explained the noise testing procedures which he follows in conducting noise surveys, and he confirmed that the dosimeter and noise level meters were properly calibrated and used to support the citations which he issued (Tr. 155-159).

Mr. Spruell stated that the jumbo drill is either factory-equipped with a muffler, or is manufactured in such a way as to facilitate the installation of a muffler. He stated that the respondent used "rubber type" mufflers, but that in this instance did not equip one of the drills with a muffler because "they didn't feel it had done that much good, and they didn't see any reason they would have to have it there" (Tr. 159).

Mr. Spruell stated that the drill violation presented a loss of hearing and permanently disabling type injury, and that he made a gravity finding of "highly likely" because the operator was not wearing hearing protection at all times, and he had to consider it highly likely that he would suffer some type of hearing loss from being exposed to noise of the level

tested. Mr. Spruell confirmed that he made a "moderate" negligence finding because the operator was wearing hearing protection "at times," and one of the drills had a muffler (Tr. 161-162).

On cross-examination, Mr. Spruell confirmed that the drill was running at the time he observed the operator without his hearing muffs, and while conceding that he stated on the citation that "personal hearing protection was being worn," he explained that he made that statement to give the respondent the benefit of the doubt, and because the operator was wearing ear muffs "the biggest part of the time" (Tr. 164, 165). Mr. Spruell conceded that in the 9 years he has inspected the respondent's mines, he has not previously cited any noise violations (Tr. 167), and the reason for this is that no prior noise surveys were made at the mines (Tr. 208).

Mr. Spruell confirmed that in the course of issuing his noise citations, he monitored the employees, but did not stay with them for the entire 8 hours. He confirmed that the employees were exposed to other mixed noise sources in the course of their work, and although they were wearing muffs, they were still exposed to measured noise levels above those required by the cited standards. With regard to the jumbo drill, his noise level meter recorded the sound level from that particular piece of equipment only, and his 118 decibel reading with the sound level meter was from that drill (Tr. 170). Noise levels measured with a dosimeter indicate the work environment noise exposure, while sound level meter readings measure an instantaneous noise exposure level (Tr. 173).

Mr. Spruell explained that a dosimeter records all noise exposure levels that are 90 decibels or above over a full working shift, and while it is true that it records noise levels from different sources and does not differentiate the amount of noise coming from any one particular source, a sound level meter reading can (Tr. 177). In the case of the jumbo double drill citation, a noise level meter reading alone was sufficient to support the citation (Tr. 178).

Mr. Spruell confirmed that among his suggestions to the respondent for achieving compliance with the noise standards was a suggestion that mufflers be installed or put back on the equipment in question. He agreed that the installation of mufflers would not achieve total compliance and that the equipment operators would still be required to wear personal hearing protection. Mr. Spruell also agreed that there were no other feasible engineering controls that would bring the

respondent into compliance with the noise standards, but that in one instance a cab did bring the drill operator in his compartment into compliance, but would probably not bring others who are exposed to the drill noise into compliance (Tr. 180-181).

Mr. Spruell contended that with the installation of equipment mufflers, which are feasible engineering controls, and the wearing of personal hearing protection, the respondent will come into compliance, but without the personal hearing protection, it would not be in compliance (Tr. 184). Respondent's representative agreed that this is the issue that is basically involved in all of the noise citations which were issued in these proceedings, and that it has done everything required by MSHA to abate the citations and attempt to stay in compliance (Tr. 184-185).

Diane Brayden, Industrial Hygienist, MSHA's Duluth, Minnesota District Office, testified as to her experience, education, and training in noise matters. She confirmed that she holds a B.S. degree in biology, and a master's degree in industrial hygiene, and that she has been in her present position with MSHA for 10 years (Tr. 249-251). She has participated in approximately 50 MSHA inspections involving noise, has visited mine sites where violations have occurred, and has testified for MSHA as an expert witness (Tr. 253).

Ms. Brayden confirmed that she has reviewed the citations in this case, and that the mufflers involved are the exhaust type used to decrease the amount of energy being exhausted from compressed air, and to dissipate exhaust noise, which is a major contributor to the total noise emitted by the machines. She stated that the use of mufflers is feasible, and that the small noise decibel decreases resulting from the use of such mufflers translates into a significant change in the amount of energy that is doing the noise damage. In her opinion, the use of personal hearing protection to achieve a degree of compliance that has not been achieved by other means is unreliable because the hearing protectors such as muffs and ear plugs are tested under laboratory conditions which are not reflective of actual mine conditions and the use of other equipment, and she referred to several articles dealing with the testing and reliability of such personal hearing devices (Tr. 253-263).

With regard to Citation No. 2865785 for the jumbo drill, and after hearing the testimony regarding that citation, Ms. Brayden's was of the opinion that while the noise exposure was significantly reduced by the installation of a muffler to

abate the citation, the dosimeter reading of 1,867 percent of allowable noise exposure would indicate that the drill operator was losing his hearing to a significant degree even if he were to wear his ear muffs all day. With regard to this piece of equipment, the driller would be required to wear both ear plugs and muffs as well as having a muffler on the drill (Tr. 265-266).

Ms. Brayden considered the installation of mufflers on the equipment to be extremely important, and that the installation of such a muffler would take about 2 or 3 hours. She conceded that mufflers used on equipment under freezing conditions do aggravate existing freezing conditions, but that the use of air dyers to alleviate this problem is common in the industry. She believed that the use of mufflers as an engineering noise control device will permit the personal hearing protection to work more effectively in that the individual is exposed to less noise exposure (Tr. 269).

On cross-examination, Ms. Brayden stated that as a general rule, exhaust noise is a major contributor to the total amount of noise exposure from other sources, but she could not state the percentage of noise that would be attributable to the exhaust without testing the particular piece of equipment (Tr. 270). She agreed that a muffler would not bring a drill into total compliance below 90 decibels, and that this would probably be true also for ear muffs. She stated that while MSHA would like to achieve total noise protection, in most cases total protection is not possible, and that to the degree that protection is available, the employee should have it (Tr. 272).

Ms. Brayden also conceded that the wearing of ear protection throughout the day will not guarantee an employee's hearing, but that MSHA's position is that engineering controls are to be implemented to the degree that compliance can feasibly be met in that manner and that hearing protection will be accepted after that to achieve the remainder of the compliance. She believed that mufflers are a feasible engineering control in that they reduce noise to a significant degree, but that they are not capable of bringing the operator's exposure down to a 90 decibel level. However, mufflers are still considered by MSHA to be a feasible control in that their use reduces the noise exposure significantly, and without the muffler the employee would be exposed to a greater degree of noise than he would be with the muffler, regardless of whether he is in full compliance with the standard (Tr. 276-277).

Findings and Conclusions

Docket Nos. LAKE 88-4-M and LAKE 88-22-M

In these cases, the respondent is charged with violations of the mandatory noise exposure requirements found in 30 C.F.R. § 57.5050. Citation Nos. 2865757, 2865758, 2865759, 3059584, and 3059585 were issued because of the failure by the respondent to utilize feasible engineering controls to reduce noise levels of over 90 decibels for an 8-hour period in violation of section 57.5050(b), and Citation No. 2865785 was issued for the failure by the respondent to utilize feasible engineering controls to reduce noise exposure in excess of 115 decibels in violation of section 57.5050. The cited noise standards provide as follows:

57.5050 Mandatory. (a) No employee shall be permitted an exposure to noise in excess of that specified in the table below. Noise level measurements shall be made using a sound level meter meeting specifications for type 2 meters contained in American National Standards Institute (ANSI) Standard S1.4-1971. "General Purpose Sound Level Meters," approved April 27, 1971, which is hereby incorporated by reference and made a part hereof, or by a dosimeter with similar accuracy. This publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, or may be examined in any Metal and Nonmetal Mine Health and Safety District or Subdistrict Office of the Mine Safety and Health Administration.

PERMISSIBLE NOISE EXPOSURES

Duration per day, hours of exposure	Sound level dBA, slow response
8	90
6	92
4	95
3	97
2	100
1-1/2	102
1	105
1/2	110
1/4 or less	115

No exposure shall exceed 115 dBA. Impact or impulsive noises shall not exceed 140 dB, peak sound pressure level.

NOTE. When the daily exposure is composed of two or more periods of noise exposure at difference levels, their combined effect shall be considered rather than the individual effect of each.

If the sum

$$(C_1/T_1) + (C_2/T_2) + . . . (C_n/T_n)$$

exceeds unity, then the mixed exposure shall be considered to exceed the permissible exposure C_n indicates the total time of exposure at a specified noise level, and T_n indicates the total time of exposure permitted at that level. Interpolation between tabulated values may be determined by the following formula:

$$\log T = 6.322 - 0.0602 SL$$

Where T is the time in hours and SL is the sound level in dBA.

(b) When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels to within the levels of the table.

The respondent agreed that all of the contested citations concern common issues, and involve the absence of mufflers on the particular pieces of equipment being operated by the miners who were out of compliance with the noise exposure requirements found in the cited standard (Tr. 211). All of the affected miners were wearing personal hearing protection at the time the citations were issued, and although abatement was achieved by the installation of mufflers on the cited equipment, the respondent was still out of full compliance with the cited standards. The respondent denied that it seeks to discontinue the use of personal hearing protection devices, or that it had any problems in installing mufflers on the cited equipment in question (Tr. 231-233). Respondent contended that section 57.5050(b) does not include a requirement

that noise levels be reduced to any specific level and permits the continued use of personal hearing protection notwithstanding the fact that feasible engineering noise control devices such as mufflers still do not reduce the noise levels to within permissible levels (Tr. 215). Respondent took the position that requiring it to install mufflers on its equipment is an exercise in futility because it would still be out of compliance and the equipment operators would still be required to wear personal hearing protection. In this regard, respondent's representative stated that MSHA "wants us to spend money for remedies that don't work."

The respondent conceded that MSHA has not required it to do anything other than install mufflers and to insure that its employees wear personal hearing protection. However, it is concerned that future inspections will require it to do more and that "it's an ongoing thing" (Tr. 199-201). Inspector Spruell stated that had the mufflers been installed on the equipment, and all employees were wearing personal hearing protection, he would not have issued the citations (Tr. 203). He confirmed that he issued the citations because of the absence of mufflers which are considered feasible engineering controls to reduce noise levels (Tr. 203). Although Mr. Spruell mentioned the use of cabs as feasible noise controls, he conceded that they are not feasible at the respondent's mines, but that mufflers definitely are. Further, Mr. Spruell could cite no other feasible noise controls available at this time for the respondent other than mufflers (Tr. 207).

During the course of the hearing, the respondent conceded that all of the cited equipment was out of compliance with the noise level requirements found in the cited standards, and it did not deny the existence of the conditions cited and described by the inspectors on the face of the citations. Further, the respondent did not question the noise exposure levels cited by the inspectors as a result of their noise survey tests, nor did it question the test procedures followed by the inspectors with respect to the use of dosimeters and noise level meters in support of the citations (Tr. 212-215; 220, 236, 239-241). The respondent further agreed that a dosimeter which is attached to a miner during a noise survey records the sound levels in his normal working environment, and that once it is attached to an employee, there is no requirement that an inspector stay with the employee and monitor his movements during the entire 8-hour working shift (Tr. 170). Respondent also agreed that a dosimeter measures the noise exposure level for an employee's working environment

over a full 8-hour shift, and that a noise level meter gives an instantaneous reading of the noise level exposure.

In its posthearing brief, the respondent asserts that as a result of the mobility of its employees, they are exposed to numerous noise sources such as loaders, trucks, drills, fans, and rock breakers during the normal course of a days work, and it rejects MSHA's argument that the installation of a muffler on a single piece of equipment being operated by an employee resulted in a reduction of the noise exposure level, and that coupled with the use of personal hearing protection, the respondent is in compliance with the standard. Respondent states that it rejects this argument because MSHA did not address the issue of total 8-hour exposure and the feasibility of muffling of all noise exposure sources that an employee would encounter during the duration of his work shift. In support of this argument, the respondent cites my prior decision in ASARCO, Inc., v. Secretary of Labor, 3 FMSHRC 1300 (May 1981), in which I vacated a noise citation after finding that MSHA's suggested use of certain noise controls were not technologically feasible because of the required mobility of the cited equipment operators.

The respondent further argues that MSHA has failed to prove that any feasible engineering controls are available for multi-noise sources resulting from equipment operator mobility, and that in the abatement of the citations MSHA made no effort to inspect for 8-hour noise exposure to the employee, but simply relied on an instant sound meter reading on single items of equipment. The respondent suggests that this type of testing fails to prove that the type of muffler suggested by the inspectors for installation on the cited equipment did in fact lower the 8-hour noise exposure levels in question. The respondent points out that while Inspector Spruell agreed that it was in compliance after the mufflers were installed, he could not speak for other inspectors, and the respondent expressed concern that other inspectors may in the future continue to cite it for being out of compliance in the same circumstances.

Citing a decision by former Commission Judge Charles Moore in Hilo Coast Processing Company v. Secretary of Labor, 1 FMSHRC 895 (July 1979), respondent argues that the lack of any identifiable and definitive MSHA criteria for economically feasible noise controls when they do not bring noise exposure within permissible limits leaves the matter to the judgment of individual inspectors, and requires an operator to guess at what must be spent on noise controls that will meet the estimate of some unknown inspector at some future time. In the

Hilo case, Judge Moore vacated several noise citations after finding that MSHA had failed to prove that certain engineering controls recommended by the inspector were technically and economically feasible. Judge Moore found that for the most part, MSHA's proof was based on the unsupported personal judgments of the inspector who issued the citations, and that the operator was left in the untenable position of "guessing" as to what was required by the inspector for compliance.

During the course of the hearing, MSHA took the position that although the installation of mufflers on the cited equipment in question were feasible engineering controls which could readily be used to reduce the noise level, personal hearing protection would still be required in conjunction with the use of the mufflers. MSHA pointed out that the respondent's complaint is that it was still required to use personal hearing protection even though the use of mufflers did not reduce the noise exposure to within the levels required by the table found in section 57.5050 (Tr. 186). MSHA's view is that the installation of the mufflers resulted in a significant reduction of the noise levels to which the employees operating the equipment were exposed, and that this is precisely what section 57.5050 mandates (Tr. 230).

In its posthearing brief, MSHA asserts that the mufflers used to reduce the noise levels in question are feasible engineering controls because (1) the operators of the equipment were exposed to excessive noise; (2) the mufflers were capable of reducing noise exposure and were technologically feasible; (3) a significant noise reduction was obtained by the use of the mufflers; and (4) the cost estimates for the mufflers were sufficiently precise and were not wholly out of proportion to the expected benefits.

In MSHA v. Callanan Industries, Inc., 5 FMSHRC 1900 (November 1980), the Commission construed the term "feasible" as "capable of being done," and it concluded that the determination of whether the use of an engineering control to reduce a miner's exposure to excessive noise is capable of being done involves consideration of both technological and economic achievability. In allocating the burden of proof required to make this determination, the Commission offered the following guidelines at 5 FMSHRC 1909:

[I]n order to establish his case the Secretary must provide: (1) sufficient credible evidence of a miner's exposure to noise levels in excess

of the limits specified in the standard; (2) sufficient credible evidence of a technologically achievable engineering control that could be applied to the noise source; (3) sufficient credible evidence of the reduction in the noise level that would be obtained through implementation of the engineering control; (4) sufficient credible evidence supporting a reasoned estimate of the expected economic costs of the implementation of the control; and (5) a reasoned demonstration that, in view of elements 1 through 4 above, the costs of the control are not wholly out of proportion to the expected benefits. After the Secretary has established each of the above elements, the operator in rebuttal may refute any of the components of the Secretary's case.

In Todilto Exploration and Development Corporation v. MSHA, 5 FMSHRC 1894 (November 1983), an inspector cited a violation of 30 C.F.R. § 57.5-50(b), after conducting an 8-hour noise survey with a dosimeter on a jackleg percussion rock bolt drill in an underground uranium mine and finding that the drill operator was exposed to 114 dBA. The drill operator was wearing ear plugs and muffs, and the drill was not equipped with a muffler. The violation was abated by the installation of a muffler on the drill. However, subsequent noise readings with a sound level meter showed that excessive noise levels still existed, and the readings established that the drill operator's average noise exposure levels ranged between 110 dBA and 113 dBA. Even though Todilto attached a muffler to the drill, the drill operator was still required to wear personal protective equipment.

The judge found that the drill operator was exposed to an excessive noise level, and although he also found that MSHA established that the installation of the muffler was an engineering control available to Todilto, since the exposure to noise was still not within permissible levels as required by the regulation, even with the muffler attached, the judge concluded that the installation of the muffler was not a feasible engineering control, and he vacated the citation. On appeal, the Commission reversed and stated as follows at 5 FMSHRC 1896-1897:

[W]e hold that a control may indeed be "feasible" within the meaning of 30 C.F.R. § 57.5-50(b) even though it does not reduce the miner's exposure to noise to permissible levels

set forth in subsection (a) of the standard. Our holding is based upon the express wording of the noise standard. Section 57.5-50(b) unambiguously provides that when excessive noise exposure levels exist, "feasible administrative or engineering controls shall be utilized." It continued, "[i]f such [feasible] controls fail to reduce exposure to within permissible levels, personal protection equipment is to be provided and used" (Emphasis added). Thus, the noise standard clearly contemplates that in a given case a control might not reduce the noise exposure level to within permissible levels, but nevertheless be a "feasible" control required to be implemented. To allow a mine operator to proceed directly to the use of personal protective equipment and thereby avoid implementing otherwise feasible administrative or engineering controls, solely because use of the controls themselves does not achieve permissible exposure levels, would be to allow circumvention of the standard's clear requirement that excessive noise levels first be addressed at their source. We note that under the judge's approach a control that reduces the level of noise from 114 dBA to 91 dBA (on the basis of an 8-hour exposure period) would not be feasible simply because it fails to reduce the noise level to 90 dBA. We find no support for this result in the standard.

The Todilto case was remanded for the judge's determination as to whether or not MSHA proved a violation of section 57.5-50(b) for failure by the operator to implement a feasible engineering control within the parameters of the Commission's guidelines as enunciated in Callanan, supra. On April 17, 1984, the judge issued his decision and found that MSHA had established that the drill operator was exposed to an excessive noise level, that the muffler was a technologically achievable engineering control capable of reducing the drill operator's noise exposure, and that the cost was not unreasonable for the benefits achieved. The judge found that Todilto was in violation of section 57.5-50(b), and stated in pertinent part as follows at 6 FMSHRC 934 (April 1984):

Therefore, based upon the credible evidence in this case, and the Commission's decision in Callanan, I find that the Secretary has proven the respondent violated mandatory

standard § 57.5-50(b) by failing to implement the feasible engineering control (muffler) which was available to it. The fact that the muffler did not reduce the noise level to that required by the standard is not a proper reason for an operator to avoid the control and go directly to personal protection equipment. The standard contemplates the use of such personal equipment only after all other "feasible" engineering controls are installed to achieve the best results possible.

In MSHA v. Landwehr Materials Inc., 8 FMSHRC 54 (January 1986), Judge Broderick affirmed a citation for a violation of section 56.5-50(b), after finding that a shovel operator at a limestone quarry who was wearing personal hearing protection was exposed to a 96 dBA noise level for an 8-hour shift. After the termination date for the citation was extended, MSHA's Denver Technical Support Group performed a noise control survey which showed that the noise level in the shovel operator's environment was reduced by approximately 33 percent, from an average of 101 to 98 dBA, when a vinyl curtain was installed between the shovel operator and the engine compartment of the shovel. While significant, this reduction did not bring the noise level down to the permissible 90 dBA specified in the cited standard, and personal protection equipment was still deemed necessary. Judge Broderick found that the installation of the vinyl curtain was a feasible engineering control available to reduce the operator's noise exposure, and that Landwehr's failure to utilize this feasible noise control constituted a violation of section 56.5-50(b).

In MSHA v. Texas Architectural Aggregates, Incorporated, 9 FMSHRC 1136 (June 1987), I affirmed a violation of section 57.5050(b), after finding that the development and installation of a noise barrier on a drill were not wholly out of proportion to the resulting noise reduction benefits which were achieved, and that the fact that the 5 dBA noise reduction with the use of the barrier did not bring the mine operator into total compliance with the permissible level stated in the standard is no reason to excuse the use of the barrier or from continuing to use personal hearing protection in conjunction with the barrier.

After careful consideration of all of the arguments presented in these proceedings, I conclude and find that MSHA has the better part of the argument, and on the facts here presented, its position is correct. The respondent's reliance on the ASARCO and Hilo Coast decisions, supra, are not well taken.

The facts in those cases are clearly distinguishable from those presented in the instant proceedings. In those cases, the citations were vacated because of a lack of any credible evidence that feasible or economically achievable administrative or engineering noise controls were available for use by the operators to reduce noise exposure. The credible evidence presented in the instant cases establishes that the use of mufflers were economically feasible for use on the equipment, and that once installed, the noise levels were reduced.

The evidence establishes that after the installation of the mufflers, the mixed noise exposure to the No. 1 haulage truck operator was reduced from 100.3 dBA to 99.5 dBA; the noise level exposure to the No. 2 truck haulage operator was reduced from 99.3 dBA to 95.5 dBA; the noise exposure to the front-end loader operator was reduced from 97.7 dBA to 95.9 dBA; the noise exposure to the jumbo drill operator was reduced from 111 dBA to 105.9 dBA; the noise exposure to the Wagner 2B loader operator was reduced from 93 dBA to 92.3 dBA; and the noise exposure to the Scoopy No. 2 loader operator was reduced from 98 dBA to 94.6 dBA.

Inspector Spruell confirmed that his noise level test with a noise level meter recorded only the noise from the jumbo drill because that was the only piece of equipment operating at the time, and he did not test any of the jack legs located in another heading because they were equipped with mufflers and would be in compliance, and they were not in operation when he tested the drill (Tr. 168-170). He also confirmed that the noise level measurements taken by means of the dosimeters measured the mixed noise exposure of each of the other equipment operators in their respective work environments during the course of their work shifts. MSHA's noise expert Brayden confirmed that exhaust noises emitted by the machines in question are major contributors to the total noise emitted by that equipment as well as to the total noise exposure from other sources, and that the use of the mufflers were feasible engineering controls that reduced the total noise exposure to a significant degree. In her un rebutted opinion, the small noise decibel decreases which resulted from the installation of the mufflers on the equipment translated into a significant change in the amount of exhaust energy causing noise damage, and that the use of mufflers reduces the noise exposure significantly. Without the use of the mufflers on the equipment, the employees would be exposed to a greater degree of noise.

In view of the foregoing findings and conclusions, I conclude and find that the petitioner has established violations

for each of the noise citations in question by a preponderance of the credible evidence adduced in these proceedings, and they are all AFFIRMED.

Docket No. LAKE 87-85-M

Fact of Violation

In this case, the respondent is charged with a violation of mandatory reporting standard 30 C.F.R. § 50.20, for failing to report an eye injury to miner Joseph Clanton. The record reflects that Mr. Clanton was exposed to hydrogen sulfide gas while working underground on Thursday, April 30, 1987, and that after coming to the surface at the end of his work shift and exiting the mine, he experienced severe pain to his eyes and went to see a doctor for treatment. Mr. Clanton did not work the following day, Friday, May 1, but did work on Saturday, May 2. The respondent maintains that Mr. Clanton's failure to report for work on May 1, was not due to his injury, and the petitioner claims that it was.

Section 50.20(a), 30 C.F.R. § 50.20(a), of the regulations provides:

(a) Each operator shall maintain at the mine office a supply of MSHA Mine Accident, Injury, and Illness Report Form 7000-1. These may be obtained from MSHA Metal and Nonmetallic Mine Health and Safety Subdistrict Offices and from MSHA Coal Mine Health and Safety Subdistrict Offices. Each operator shall report each accident, occupational injury, or occupational illness at the mine. * * * The operator shall mail completed forms to MSHA within ten working days after an accident or occupational injury occurs or an occupational illness is diagnosed.

* * * * *

Section 50.2(e) 30 C.F.R. § 50.2(e) states:

(e) "Occupational injury" means any injury to a miner which occurs at the mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job.

Section 50.2(g), 30 C.F.R. § 50.2(g) states:

(g) "First aid" means one-time treatment, and any follow-up visit for observational purposes, of a minor injury.

The criteria for differentiating between medical treatment and first aid is found in section 50.20-3. Medical treatment includes, but is not limited to, the treatments and procedures described in subsection (a). First aid is described as follows:

First aid includes any one-time treatment, and follow-up visit for the purpose of observation, of minor injuries such as cuts, scratches, first degree burns and splinters. Ointments, salves, antiseptics, and dressings to minor injuries are considered to be first aid.

The criteria for treatment of eye injuries is found in section 50.20-3(a)(5), which provides as follows:

(5) Eye Injuries. (i) First aid treatment is limited to irrigation, removal of foreign material not imbedded in eye, and application of nonprescription medications. A precautionary visit (special examination) to a physician is considered as first aid if treatment is limited to above items, and follow-up visits if they are limited to observation only.

(ii) Medical treatment cases involve removal of imbedded foreign objects, use of prescription medications, or other professional treatment.

MSHA's policy guidelines with respect to the reporting requirements of Part 50, Title 30, Code of Federal Regulations, are found in MSHA Program Information Bulletin No. 86-6C and 86-3M, December 11, 1986, (Exhibit R-1). These guidelines provide in pertinent part as follows:

In some cases, an injured or ill employee may miss one or more scheduled days or shifts and it will be uncertain if the employee was truly unable to work on the days missed. Situations may arise when a physician concludes that the employee is able to work but the employee feels that he or she is not able. In such

instances, the employer should make the final judgment based on all available evidence. Similarly, if a doctor tells the employee to take time off and the company requests a second opinion, and the second doctor says the employee can return to work, it would be the employer's decision as to when the employee was able to return to work. (Page 8).

* * * * *

Medically treated injuries are reportable. First-aid injuries are not reportable provided there are no lost workdays, restricted work activity or transfer because of the injury.

Medical treatment does not include first-aid treatment (one-time treatment and subsequent observation of minor scratches, cuts, burns, splinters, and so forth, which do not ordinarily require medical care) even if it was provided by a physician or a registered professional person.

* * * It is not possible to list all types of medical procedures and treatments and on that basis alone determine whether first aid or medical treatment was involved. The important point to be stressed is that the decision as to whether a case involves medical treatment should be made on the basis of whether the case normally would require medical treatment. The decision cannot be made on the basis of who treats the case. First aid can be administered by a physician or another medical person and medical treatment can be administered by someone other than a physician. (Page 9).

* * * * *

Prescription medication--Any use of prescription medication normally constitutes medical treatment. However, it should be considered first aid when a single dose or application of a prescription medication is given on the first visit merely for the relief of pain or as preventive treatment for a minor injury. This situation may occur at facilities having dispensaries stocked with prescription

medications frequently used for preventive treatment and relief of pain and attended by a physician or a nurse operating under the standing orders of a physician. The administration of nonprescription medication in similar circumstances would be considered first aid. (Page 10).

* * * * *

Eye injuries. First-aid treatment is limited to irrigation, removal of foreign material not imbedded in the eye, and application of nonprescription medications. A precautionary diagnostic visit (special examination) to a physician is considered as first aid if the treatment is limited to the above items. Follow-up visits are limited to observation only. Medical treatment cases involve removal of imbedded foreign objects, use of prescription medications, or other physician-type treatment. (Page 11).

* * * * *

23. Q. What are "days away from work" and how are they calculated.

A. "Days away from work" are days which the employee would have worked but could not because of an occupational injury or an occupational illness.
* * * (Page 26).

* * * * *

47. Q. What is an occupational injury?

A. An occupational injury is any injury to an employee which occurs at a mine. To be reportable, the injury must (1) require medical treatment, or (2) result in death or loss of consciousness, or (3) result in the inability of the injured person to perform all of the job duties required by the job on any day after the injury, or (4) require the injured person to be temporarily assigned to

other duties, or (5) require the injured person to be transferred to another job, or (6) require the injured person to be terminated. (Page 32).

* * * * *

58. Q. Should an operator report questionable injuries?

A. Operators have an obligation to investigate all injuries happening or alleged to have happened on mine property. After an investigation has been completed, the operator must make the determination as to whether the incident is reportable to MSHA. If he has any doubt, he should report. If the operator's conclusion is that no incident occurred, then there is nothing to report. (Page 34).

Respondent's Arguments

The respondent maintains that the facts surrounding Mr. Clanton's eye injury constitutes a "doubtful reporting case," and in deciding whether or not to report such an injury, it relied on the guideline information contained on page 8 which allows a mine operator to make the final judgment in situations of uncertainty. Based on all of the available evidence at the time of the injury, respondent concludes that the injury was not reportable.

In support of its position that the injury was not reportable, the respondent points out that on the day of the injury Mr. Clanton worked all day at his regular job as a drillman, that his exposure to the gas did not hinder his ability to perform his work that day, and that other employees working in the same work environment did not file any reports of injury and were present for work the following morning. Referring to the Surgeon's Report dated May 5, 1987, (exhibit P-2B), the respondent further points out that it states that Mr. Clanton's eyes were congested, but that his vision was intact and his lungs were clear, and that the treatment administered consisted of irrigating his eyes with sterile water and an application of an ointment. Given this treatment, and the fact that the report states that further treatment was not needed, the respondent concludes that on the day of his visit

to the doctor, Mr. Clanton had no vision damage, could see normally, his lungs were unimpaired, and no medical reason is stated in the report as to why Mr. Clanton could not work.

Referring to a doctor's statement dated June 19, 1987, (exhibit P-3), the respondent further points out that the statement indicates that rather than reporting back to the doctor on May 5, 1987, as instructed, Mr. Clanton returned the day after his injury, May 1, 1987, without an appointment, and his vision was intact and his eyes were clear. No symptoms or conditions were cited that would have prevented Mr. Clanton from reporting to work, and the doctor reported that Mr. Clanton could work on Saturday, May 2, 1987. The respondent finds this unusual in that Saturday was not normally a scheduled work day, but Mr. Clanton was aware that the mine had been scheduled for work that day and by being released that day he could and did in fact work at time and one-half his normal rate. The respondent states that in most cases, the doctor would have scheduled a reporting time as Monday unless requested to do otherwise. Under these circumstances, the respondent concludes that a prudent man would have to assume that if all of the symptoms which gave rise to the problem in the first place are gone, Mr. Clanton was fit, well and able to return to work on May 1, 1987.

Finally, the respondent asserts that according to Mr. Clanton's own testimony during the hearing, he admitted that he was not unable to work on Friday, May 1, 1987, but was unwilling to do so and that he would not have returned to work that day even if the doctor had told him to do so (Tr. 65-66). The respondent points out that Mr. Clanton had previously been disciplined by verbal and written reprimand for walking off the job on two occasions in March and August, 1987, (exhibit R-3), and that his demeanor and statements made during the hearing reflects a hostile dislike for his job assignment, the company, and authority in general. The respondent concludes that Mr. Clanton's failure to report for work on May 1, 1987, the day after his injury, was not the result of his injury, but rather, a decision of his own which had no connection with his injury. The respondent further concludes that Mr. Clanton's injury was a "doubtful case" consisting of first aid, and that the respondent exercised its discretion and judgment in such cases in concluding that the injury did not have to be reported (Tr. 139-140).

Petitioner's Arguments

During the course of the hearing, petitioner's counsel asserted that Mr. Clanton lost a day of work on May 1, 1987,

because of his eye injury. Counsel asserted that when Mr. Clanton went to the doctor on April 30, he was treated and told to come back the following Tuesday, May 5, and that the doctor "was expecting that he wasn't going to work the following day." Although Mr. Clanton was feeling better and went back to see the doctor on Friday, May 1, and the doctor found that his eyes and vision were clear, the doctor did not tell him to go to work that day and "considered that he shouldn't go to work that Friday and go back to work on Saturday." Since Mr. Clanton was unable to work on Friday, counsel concluded that his injury was reportable (Tr. 140-141).

In his posthearing brief, petitioner's counsel argues that Mr. Clanton's eye injury was a reportable occupational injury because it required medical treatment and he was unable to perform all of his job duties the day after his injury. Counsel cites the definition of "occupational injury" found in section 50.2(e), which states that such an injury is one which requires medical treatment or which results in the miner's inability to perform all job duties on any day after an injury. Counsel also cites the criteria for treating eye injuries found in section 50.2-3(a)(5), which states that medical treatment cases involve the use of prescription medications.

Citing page 1315 of the Physicians Desk Reference, 42 Edition, 1988, published by Edward R. Barnhart, regarding the decadron family or prescriptions for eye treatment, petitioner's counsel asserts that Mr. Clanton received prescription medication, that Neosporin Opt Ointment was prescribed three times daily, and that in first aid treatment the doctor does not prescribe medications with instructions for its continued use. Counsel also cites the un rebutted testimony of Mr. Clanton that the doctor told him not to work the day following his injury (Tr. 56).

Finally, counsel states that the record establishes that the respondent was familiar with MSHA's requirements for reporting injuries, and in response to the respondent's "doubtful" case defense, points out that MSHA's policy guidelines state that doubtful cases should be reported.

Findings and Conclusions

Inspector Spruell confirmed that he issued the citation after reviewing the respondent's accident and injury records. His review included an examination of a report prepared by Mr. Clanton's supervisor K. E. Clanton, who is not related to Mr. Clanton, and it was prepared on May 6, 1987 (exhibit P-2). That report indicates that Mr. Clanton "lost 1 day 5-1-87."

At the time the citation was issued, Mr. Spruell was unaware of the fact that Mr. Clanton had received any medical treatment, but after speaking with him at a later time, he learned from Mr. Clanton that he had been "blinded" by his exposure to gas and had visited a doctor. Mr. Spruell also confirmed that he reviewed a report filed by the respondent's accountant, Mrs. E. L. Spivey on May 6, 1987, with the state workers' compensation office which indicated that Mr. Clanton's case was a "lost workday case" (exhibit P-2-2D). In view of the fact that the inspector could find no record that the respondent had reported the injury to MSHA, he issued the citation. The violation and citation were abated that same day after Mrs. Spivey filled out the required MSHA Form 7000-1 (exhibit P-2-2C).

Inspector Spruell confirmed that the respondent had never been previously cited for failure to report accidents or injuries, and with the exception of the citation which he issued in this case, the respondent always maintained its records current. He confirmed that Mrs. Spivey told him that she had not filed the injury report in question because she was not aware of the fact that all lost time injuries had to be reported.

Mrs. Spivey was not called to testify in this case. Although Mine Superintendent Pilcher acknowledged that MSHA's guidelines require the reporting of "serious question" injury cases, he took the position that Mr. Clanton's case was a "first aid" type of injury case, rather than a medical treatment case, and that in his judgment, the injury did not have to be reported. He also believed that the guidelines were not clear as to whether a "first aid" case needed to be reported, and that Mr. Clanton's failure to work on the day after his injury was unrelated to his injury, and that Mr. Clanton simply did not wish to return to work.

Safety and Industrial Relations Inspector Dowling confirmed that no MSHA injury report was filed because it did not appear that Mr. Clanton's case was a lost time accident case pursuant to MSHA's guidelines. He believed that a first aid situation establishes a "doubtful case" under MSHA's guidelines, and that in the exercise of its judgment not to report the injury, the respondent acted properly and did not attempt to hide anything from MSHA. Mr. Dowling could offer no explanation as to why the forms executed by the respondent which were reviewed by the inspector reflected "one lost day," nor could he recall whether he specifically discussed with Mrs. Spivey the need to file a report with MSHA. Mr. Dowling concluded that since no charges were received from the doctor

for any prescription medicine, Mr. Clanton's injury was a first aid case, and that he "probably" instructed Mrs. Spivey not to file an MSHA report. Mr. Dowling confirmed that he did not speak to the doctor, and that the doctor's statement of June 19, 1987, was obtained to confirm Mr. Dowling's belief that Mr. Clanton's case involved some reasonable doubt as to whether his injury needed to be reported.

The evidence adduced in this case, including Mr. Clanton's admissions, suggest that his eye condition had cleared up on May 1, 1987, when he voluntarily returned to see the doctor, and that he was able to return to work that day but chose not to do so. There is no evidence other than Mr. Clanton's self-serving statement, that the doctor ordered him not to return to work that day. Given the fact that the doctor found that Mr. Clanton's vision was intact and his eyes were clear on May 1, and Mr. Clanton's admission that he was unwilling to return to work regardless of his eye condition, and that he would not have done so even if the doctor had specifically cleared him for work that day, I cannot conclude that Mr. Clanton was unable to perform his job duties that day, or that his lost day of work was the direct result of his eye injury.

Having viewed Mr. Clanton's demeanor and attitude toward the respondent during his testimony, which indicates a dislike for his general employment situation at the mine, I believe Mr. Clanton's reluctance to return to work was based not only on his fear of being further exposed to gas, but on his anger toward the respondent. This anger prompted Mr. Clanton to tell Mr. Pilcher and the office secretary that he would only be back to work "when they got that place straightened out, fit to work," and that he would not be back "until he got the air cleared up, so it wouldn't hurt my eyes again" (Tr. 50, 65). As a matter of fact, Mr. Clanton admitted that he was still angry about the incident, and that he intended to stay off "until they got this condition abated" (Tr. 50-51). I take note of the fact that although Mr. Clanton claimed that he had been exposed to the same gas condition 2-days prior to April 30, "when it got so I couldn't stand it," he did not report any injuries on those days, and that "what I done, was more or less to bring this to the attention to the Federal agencies that working conditions were intolerable" (Tr. 50). I also take note of the fact that Mr. Clanton returned to work on Saturday, May 2, 1987, and received premium pay for that day.

Although I have concluded that Mr. Clanton's lost day of work on May 1, 1987, was not a direct result of his injury,

this is not the sole determining factor as to whether or not his eye injury which occurred the day before was required to be reported to MSHA. The crucial question is whether or not Mr. Clanton suffered a reportable occupational injury within the meaning of MSHA's mandatory reporting regulations. An "occupational injury" is defined as any injury which occurs at the mine for which medical treatment is administered. The term "injury" has been construed by the Commission as "an act that damages, harms, or hurts," Freeman Mining Company, 6 FMSHRC 1577, 1578-1579 (July 1984).

In the instant case, Mr. Clanton's un rebutted testimony, which I find credible, indicates that he suffered severe eye pain and discomfort as a result of his exposure to hydrogen sulfide gas while working at the mine, and promptly sought treatment by going to the doctor. Under these circumstances, I conclude and find that Mr. Clanton's eye condition was an injury. The next question presented is whether or not the treatment received by Mr. Clanton constituted medical treatment or first-aid. A medically treated injury is considered to be a reportable occupational injury, regardless of any lost work days, but a first-aid injury is reportable, provided there are no lost workdays, restricted work activity or transfer because of the injury.

With regard to the treatment of eye injuries, one factor in determining whether such treatment is medical treatment or first-aid treatment, is the use of prescription medication as part of the treatment. The use of a prescription medication is among the criteria for determining medical treatment, and the application of nonprescription medication is included among the criteria for determining first-aid treatment.

The evidence adduced in this case reflects that the treatment received by Mr. Clanton on April 30, 1987, for his eye inflammation, or conjunctivitis, included the application of Neodecadron Ophthalmic Ointment. (See: Doctor's Report, May 5, 1987, exhibit P-2-2-B). The doctor's report of June 19, 1987, also reflects that Mr. Clanton was treated with Neosporin Ophthalmic Ointment, three times daily, and contrary to Mr. Dowling's assertion that no doctor's charges were received for any prescription medication for Mr. Clanton, the hospital bill apparently submitted to the respondent's insurance carrier, includes an emergency room charge in the amount of \$14.25 for deodecadron. (See: exhibits P-3-3A and P-3-3C).

The Physicians Desk Reference, 42d Edition, 1988, published by Edward R. Barnhart, cited by the petitioner in its posthearing brief, is a standard reference source listing

all prescription medications, and it is available at any public library. I take official notice of the information contained in this reference source with respect to the medication administered to Mr. Clanton. Neosporin Ophthalmic Ointment is listed at page 814 as a prescription medication, and the prescribed application is every 3 or 4 hours within a 7-day period. Neodecadron Ophthalmic Ointment is listed at page 1376 as a prescription medication, and the prescribed application is "a thin coating 3 or 4 times daily."

Although Mr. Clanton could not recall receiving a written prescription from the doctor for the medication in question, it seems clear to me that prescription medication was in fact used as part of his treatment, and the doctor's report of June 19, 1987, reflects that the Neosporin ointment was to be used three times daily. Mr. Clanton confirmed that after his eyes were flushed out at the emergency room, the doctor put some "salve" in his eyes and gave him the rest to use. Mr. Clanton stated that "I smeared it in there one more time" (Tr. 55).

MSHA's bulletin guidelines at page 10 state that the use of prescription medication normally constitutes medical treatment, but that a single dose or application of a prescription medication given on a first visit merely for the relief of pain or as a preventive treatment for a minor injury should be considered first aid. The available evidence in this case reflects that Mr. Clanton received more than a single dose of the prescribed medication used for the treatment of his eye injuries. Further, I find nothing in MSHA's regulatory definitions of "first-aid" or the criteria for the treatment of eye injuries that even mentions or suggests single or multiple doses of prescription medication.

In view of the foregoing, and after careful consideration of all of the available evidence in this matter, I conclude and find that Mr. Clanton's eye injuries constituted a reportable occupational injury, and that the treatment he received for his condition constituted medical treatment rather than first-aid treatment. I also conclude and find that the respondent's failure to report the injury in question constituted a violation of cited section 50.20, and the citation is therefore AFFIRMED.

With regard to the respondent's "doubtful case" defense, although one may agree that MSHA's guidelines concerning a mine operator's judgment and discretion in determining whether an employee's lost work day is attributable to an injury, the introduction of the term "single dose" in the discussion of

prescription medication, and the reference to ointments and salves as part of any first-aid treatment, without any specific reference to whether they are prescription or nonprescription, are somewhat ambiguous, the guideline instruction found on page 34 is not. It specifically states that a doubtful injury case should be reported. Under the circumstances, I reject the respondent's "doubtful case" theory as an absolute defense to the citation, but have considered it in mitigation of the respondent's negligence.

Significant and Substantial Violation

Noise Citation No. 2865785

In this instance, Inspector Spruell made a finding that the citation was significant and substantial. As a result of his dosimeter noise test, he found that the jumbo drill operator was exposed to noise levels which exceeded the allowable limit by 1,867 percent, which was equivalent to an 8-hour exposure of 111 dBA's. The jumbo drill was equipped with a left and right drill, one of which had a muffler installed, while the other one did not. The sound level which the inspector measured with a sound level meter while both drills were in operation indicated that the drill operator was exposed to continuous noise levels at 118 dBA's. The noise exposure in both instances was well over the allowable limit of 90 decibels.

A "significant and substantial" violation is described in section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 C.F.R. § 814(d)(1). A violation is properly designated significant and substantial "if, based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Cement Division, National Gypsum Co., 3 FMSHRC 822, 825 (April 1981).

In Mathies Coal Co., 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and

substantial under National Gypsum the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety-contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In United States Steel Mining Company, Inc., 7 FMSHRC 1125, 1129, the Commission stated further as follows:

We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Company, Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Company, Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

The question of whether any particular violation is significant and substantial must be based on the particular facts surrounding the violation, including the nature of the mine involved, Secretary of Labor v. Texasgulf, Inc., 10 FMSHRC 498 (April 1988); Youghiogheny & Ohio Coal Company, 9 FMSHRC 2007 (December 1987).

Inspector Spruell's significant and substantial finding was based on his belief that the noise levels to which the drill operator was being exposed was such as to make it reasonably likely that he would suffer some hearing loss. The inspector made a gravity finding of "highly likely" and that a "permanently disabling" injury of illness could reasonably be expected because of the noise level exposure to the drill operator. Although Mr. Spruell stated on the face of the citation that "personal hearing protection was being worn," he explained that he made that statement to give the respondent the benefit of the doubt since the drill operator was wearing protective ear muffs most of the time. However, when he observed the

drill operator with the drill in operation, he was not wearing his personal ear protection.

MSHA's noise expert Brayden testified that although the installation of the muffler on the drill reduced the operator's noise exposure, the dosimeter reading of 1,867 percent of the allowable noise exposure would indicate that the operator was losing his hearing to a significant degree even if he were to wear his ear muffs all day. In her opinion, the drill operator would need to wear ear plugs as well as ear muffs to protect his hearing.

In view of the un rebutted testimony of Inspector Spruell and Ms. Brayden, which I find credible and probative, I conclude and find that the noise exposure levels to which the drill operator was being exposed presented a hazard to his hearing capability, and that such noise level exposures would reasonably likely contribute to a serious loss of hearing. Accordingly, the inspector's significant and substantial finding IS AFFIRMED.

History of Prior Violations

MSHA's civil penalty assessment computer print-out for the respondent's Annabel Lee Mine for the period May 28, 1985 to May 27, 1987, reflects that the respondent paid penalty assessments in the amount of \$94 for three section 104(a) citations (exhibit P-4). The computer print-out for the Denton Mine for the period June 17, 1985 to June 16, 1987, reflects civil penalty assessment payments in the amount of \$74 for two section 104(a) citations. I conclude and find that the respondent has a good compliance record, and I have taken this into consideration in the civil penalties assessed for the violations which have been affirmed in these proceedings.

Size of Business and Effect of Civil Penalties on the Respondent's Ability to Continue in Business

The parties stipulated that the respondent's Denton and Annabel Lee Mines are small mining operations, and I adopt these stipulations as my findings on this issue. The parties also stipulated that the proposed civil penalty assessments for the violations in question will not adversely affect the respondent's ability to continue in business. I find and conclude that the payment of the civil penalty assessments for the violations which have been affirmed in these proceedings will not adversely affect the respondent's ability to continue in business.

Good Faith Compliance

The record establishes that all of the violations were timely abated in good faith by the respondent. I have taken this into consideration in the assessments made for the violations in question.

Negligence

I conclude and find that all of the violations which have been affirmed in these proceedings resulted from the respondent's failure to exercise reasonable care. Accordingly, I adopt the inspector's moderate negligence findings with respect to all of the citations as my negligence findings and conclusions on this issue.

Gravity

With the exception of "S&S" noise Citation No. 2865785, the inspector found that all of the remaining noise citations were non-"S&S", and that any injury or illness would be unlikely. They were all assessed as "single penalty" citations. He made the same findings for reporting Citation No. 2865780. I concur in these findings, and find that with the exception of "S&S" noise Citation No. 2865785, which I find was serious, the remaining violations were non-serious and not likely to result in any serious injuries.

Civil Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of section 110(i) of the Act, I conclude that the following civil penalty assessments are reasonable and appropriate for the violations which have been affirmed in these proceedings:

Docket No. LAKE 88-4-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
2865757	05/28/87	57.5050(b)	\$ 20
2865758	05/28/87	57.5050(b)	\$ 20
2865759	05/28/87	57.5050(b)	\$ 20
2865785	05/28/87	57.5050	\$ 85

Docket No. LAKE 88-22-M


<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
3058584	06/17/87	57.5050(b)	\$ 20
3059585	06/17/87	57.5050(b)	\$ 20

Docket No. LAKE 87-85-M

<u>Citation No.</u>	<u>Date</u>	<u>30 C.F.R. Section</u>	<u>Assessment</u>
2865780	05/27/87	50.20	\$ 20

ORDER

The respondent IS ORDERED to pay the civil penalties assessed in these proceedings within thirty (30) days of these decisions and orders. Upon receipt of payment by the petitioner, these proceedings are dismissed.


George A. Koutras
Administrative Law Judge

Distribution:

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Vic A. Evans, General Manager, and T. M. Dowling, Safety and
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/Eb

AUG 19 1988

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. KENT 88-83-M
Petitioner	:	A.C. No. 15-00104-05518
	:	
v.	:	V Quarry
	:	
KEN-MOR STONE, INC.,	:	
Respondent	:	

DECISION

Appearances: Anne T. Knauff, Esq., Office of the Solicitor,
U.S. Department of Labor, Nashville, TN ,
for Petitioner;
H. Davis Sledd, Esq., Lexington, KY, for Respondent

Before: Judge Fauver

This civil penalty case went to hearing on July 12, 1988, at Lexington, Kentucky. After the hearing, the parties had a settlement conference and proposed a settlement reducing the proposed penalty from \$500 to \$450 and modifying Citation/Order No. 2861409 to delete the allegation of a "significant and substantial" violation.

This decision confirms the bench decision approving the settlement at the close of the hearing.

ORDER

WHEREFORE IT IS ORDERED that the motion for approval of settlement is GRANTED and Respondent shall pay the approved penalty of \$450 within 30 days of this decision.


William Fauver
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041


AUG 19 1988

GARY L. MCCURDY,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. PENN 88-254-D
	:	MSHA Case No. PITT CD 88-16
HELVETIA COAL COMPANY,	:	
Respondent	:	Lucerne No. 6 Mine

ORDER OF DISMISSAL

Before: Judge Koutras

By letter received August 12, 1988, Complainant Gary L. McCurdy, states that he no longer wishes to pursue this matter. Under the circumstances, this case IS DISMISSED.


George A. Koutras
Administrative Law Judge

Distribution:

Mr. Gary L. McCurdy, 163 Coy Street, Homer City, PA 15748
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

AUG 19 1988

ARNOLD SHARP, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. KENT 88-109-D
: MSHA Case No. BARB CD 87-53
BIG ELK CREEK COAL COMPANY, :
Respondent : No. 1 Surface

DECISION

Appearances: Robin Webb, Esq., Hazard, Kentucky, for the
Complainant;
Edwin S. Hopson, Esq., Wyatt, Tarrant & Combs,
Louisville, Kentucky, for the Respondent.

Before: Judge Koutras

Statement of the Case

This proceeding concerns a discrimination complaint filed by the complainant against the respondent pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977. The complainant filed an initial complaint with the Secretary of Labor, Mine Safety and Health Administration (MSHA), Hazard, Kentucky, Sub-district Office, on September 14, 1987. In a signed statement executed by the complainant on that date, he made the following claims of alleged discrimination:

I feel that I have been discriminated by Big Elk Creek Coal Co., Inc., in that Judge Fauver order Big Elk Creek Coal Co., Inc., to reinstate me to the same position I had held prior to filing Discrimination Case No. BARB-CD-86-49, at the same rate of pay, status and all other benefits, as I would have attained had I not been discharged on May 28, 1986. Before my discharge on May 28, 1986, I was a rock truck driver working the day shift and making \$9.50 per hour. Since my reinstatement on September 8, 1987, I have been doing common

labor jobs (helping mechanic, holding oiler, cleaning up around the mine) on the night shift making \$8.00 per hour. At the time I was reinstated, there was a rock truck driver position open, but they hired another man for that job.

I have also asked management about my annual refresher training, newly-employed, experienced miner training and new task training. All management would say was they would see about it.

I have not received any type training in the last 15 months.

The Secretary of Labor, Mine Safety and Health Administration, conducted an investigation of the complaint and found no evidence of discrimination. The complainant was advised of this decision by letter dated April 4, 1988, and he filed his pro se complaint with the Commission. In a letter filed with the Commission on April 12, 1988, the complainant alleged that as a result of his prior discharge by the respondent, his work record and ability to continue employment as a rock driver have been "destroyed," that his credit standing has been adversely affected, and that he has suffered certain unspecified "damages" for which he seeks compensation.

The respondent filed a timely answer denying that it has discriminated against the complainant. The respondent asserted that the complaint fails to state a claim upon which relief can be granted under the Act, and it took the position that some or all of the allegations made by the complainant were settled or resolved in connection with a prior case involving these same parties. See: Arnold Sharp v. Big Elk Creek Coal Co., Inc. 9 FMSHRC 1261 (July 1987), decision by Judge William Fauver on July 22, 1987; 9 FMSHRC 1668 (September 1987), Supplemental Decision issued by Judge Fauver on September 15, 1987; and 9 FMSHRC 1822 (October 1987), Final Order issued by Judge Fauver.

A hearing was convened in Pikeville, Kentucky on August 10, 1988, and the parties appeared pursuant to notice. Although the complainant filed his complaint pro se, he subsequently retained counsel to represent him approximately 10-days prior to the commencement of the hearing.


Discussion

Prior to the taking of any testimony in this case, counsel for the parties requested an opportunity to confer with each other, and it was granted. In addition, a pretrial conference was conducted to address the issues and remedial claims raised by the complainant. During these discussions, respondent's counsel reasserted his prior claim that the complainant was attempting to relitigate matters which were before Judge Fauver in the prior case, and that these matters were resolved by a prior settlement between the parties. As an example, respondent's counsel pointed out that contrary to the complainant's claim, he is in fact employed by the respondent as a truck driver, at the prevailing mine wage rate, and that his present employment status is in compliance with the terms of the prior settlement and Judge Fauver's Supplemental Decision of September 15, 1987.

During the course of the pretrial conference, the complainant stated that he has filed at least one separate additional discrimination complaint against the respondent (Tr. 7). At the conclusion of the conference, complainant's counsel requested to withdraw the instant complaint, and stated that "we plan to proceed on in other avenues" (Tr. 6). Respondent's counsel did not object to the request to withdraw the complaint, and it was granted from the bench (Tr. 6).

ORDER

The complainant's request to withdraw his complaint IS GRANTED, and this case IS DISMISSED.


George A. Koutras
Administrative Law Judge

Distribution:

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Edwin S. Hopson, Esq., Wyatt, Tarrant & Combs, 2600 Citizens Plaza, Louisville, KY 40202 (Certified Mail)

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

COLONNADE CENTER
ROOM 280 1244 SPEER BOULEVARD
DENVER CO 80204

AUG 19 1988

BALTAZAR MADRID, : DISCRIMINATION PROCEEDING
Complainant :
v. : Docket No. WEST 87-170-D
: DENV CD 87-2
KAISER COAL CORPORATION, : Sunnyside No. 2 Mine
Respondent :

DECISION

Appearances: Dave Maggio and Don Huitt, East Carbon City, Utah, .
for Complainant;
Jathan Janove, Esq., and Diane Banks, Esq., Fabian
and Clendenin, Salt Lake City, Utah,
for Respondent.

Before: Judge Lasher

This proceeding arises under Section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (1982) (herein the Act). Complainant's initial complaint with the Labor Department's Mine Safety and Health Administration (MSHA) under Section 105(c)(2) of the Act was dismissed.

Contentions of the Parties.

Complainant Madrid, in his complaint with MSHA (Ex. D-16) alleged:

Since September of 1970 I have been employed at the Kaiser Coal Corp. mines (formerly known as Kaiser Steel Corp.) as a surface employee. On October 31, 1986 management illegally laid me off for lack of training. A summary of this discriminatory action follows:

On October 22, 1986 the management of Kaiser Coal Corp. of Sunnyside had a reduction and realignment of the workforce. At this time I was informed that I would be realigned as an underground timberman. I expressed my concern about lack of training for underground work. Later I was informed that I would be given the 40 hours new miner training before going underground and in the meantime I was to be given a job as a tippie utilityman. ^{1/}

1/ Although this allegation implies that the assignment to the tippie utilityman job was temporary, the evidence of record indicates that Madrid did not want to be assigned underground and that the tippie assignment was, as of October 24, permanent (Ex. D-11, T. 110, 132-136, 137, 145, 154, 157).

Management on October 23, 1986 told me that I was scheduled to start my training on October 27, 1986 at the College of Eastern Utah in Price, Utah and until then was to work as a tippie utilityman.

On October 24, 1986 management wrote me a letter informing me that I would not be going to the 40 hour training but would be left on the tippie.

On October 31, 1986 Kaiser Coal Corp. of Sunnyside had yet another reduction and realignment of the workforce and at this time I was told that there was no available jobs on the surface and I didn't have the training to work underground so I was to be laid off.

Thus, Madrid, a lineman (a surface position), contends that on October 31, 1986, Kaiser illegally laid him off "for lack of (underground) training." In his post-hearing brief, this contention is expanded: "They openly discriminated by not providing Mr. Madrid his forty (40) hours training under Section 115 ^{2/} of the Act and by so doing, broke the law again under 105(c) of the Same Act." In terms of discriminatory motivation, Madrid contends that "Kaiser did not want to provide training to anyone including (himself)". Complainant Madrid referred to the decision in Secretary and UMWA v. Kitt Energy Corporation, 8 FMSHRC 1342, (September 1986; ALJ) at the hearing (T. 37, 155) as

2/ Section 115, relating to "Mandatory Health and Safety Training", in pertinent part provides:

(a) Each operator of a coal or other mine shall have a health and safety training program which shall be approved by the Secretary. The Secretary shall promulgate regulations with respect to such health and safety training programs not more than 180 days after the effective date of the Federal Mine Safety and Health Amendments Act of 1977. Each training program approved by the Secretary shall provide as a minimum that-

"(1) new miners having no underground mining experience shall receive no less than 40 hours of training if they are to work underground. Such training shall include instruction in the statutory rights of miners and their representatives under this Act, use of the self-rescue device and use of respiratory devices, hazard recognition, escapeways, and walk around training, emergency procedures, basic ventilation, basic roof control, electrical hazards, first aid, and the health and safety aspects of the task to which he will be assigned.

supportive of his position. As will be discussed subsequently, this decision was recently reversed by the Federal Mine Safety and Health Review Commission (herein Commission).

Respondent Kaiser denies that the 40-hour underground training requirement of the Act's Section 115(a) is a right guaranteed by § 105(c) to miners who would otherwise be laid off ^{3/} and contends that even if it were, Madrid failed to establish a prima facie case of discrimination. Kaiser maintains that its decision to layoff Madrid resulted from its understanding that Madrid lacked the 45-day underground working experience required by Article XVI of its Labor Agreement and had nothing to do with the 40-hour training requirement of the Act. Kaiser also maintains inter alia that Madrid did not complain about or attempt to exercise a right under the Act until approximately 3 weeks after he was laid off; that the complaint that was made by Madrid was for the purpose of keeping himself in his surface job; that Madrid engaged in no "protected activity"; that it (Kaiser) had no hostility toward the 40-hour training requirement; and that Madrid by choosing to remain on the surface opted for the more desirable surface work over the job security that would have resulted had he sought underground positions.

Findings

Complainant, Baltazar Madrid, age 49 at the time of hearing, was hired by Kaiser on September 9, 1970 (T. 46, 134-136), and until October, 1986, was so employed as a lineman ---as distinguished from electrician (T. 173-174, 183-185, 207, 209, 239, 243-245, 299). The lineman position is on the surface-- as distinguished from an underground position-- and Mr. Madrid normally worked the dayshift (T. 54, 105, 236, 246). Mr. Madrid, throughout his employment with Kaiser as well as a previous employer was a lineman and he did not attempt to obtain an underground classification even though this would have helped protect him against a layoff in a reduction-in-force (T. 105-107, 134-138, 269-270).

Kaiser underwent two separate layoffs (sometimes referred to as realignments, reductions-in-force, or RIFs) in October, 1986, the first on October 22 and the second on October 31 (T. 93-94, 99). On October 22, 58 employees were laid off and 40 were realigned to other jobs. On October 31, 46 more employees were laid off and 23 more realigned (Exs. D-1, D-2; T. 205). Kaiser's total hourly workforce was reduced from 262 to 158 employees by these 2 RIFs.

3/ Subsequent to filing of briefs the Commission's decision on review in Kitt Energy, 10 FMSHRC _____ (July 15, 1988) issued which sustained this view.

At the subject mine, surface jobs are generally considered more desirable than underground positions (T. 101, 132).

In the October 22 layoff, Madrid was not laid off but was assigned (realigned) to an underground position --timberman-- and he immediately (T. 190-191) filed a grievance alleging that Kaiser had no right to eliminate his surface position as lineman (T. 101, 131, 261-262). The record clearly indicates that Mr. Madrid was opposed to working underground (T. 53-54, 63, 104, 131, 137, 145, 191, 262) and complained that he had insufficient underground experience (T. 190-193; Ex. D-1, p. 4).

Mr. Madrid testified:

Q. If you can have your choice, you'll stay on the surface?

A. Sure.

Q. And at the time you filed a grievance saying that lineman job was improperly eliminated; right?

A. Right.

Q. And your goal at that time was to remain as a lineman on the surface?

A. Sure.

Q. Now, after you were realigned to tippie, okay, but before you were laid off, you didn't complain to anyone, did you, that you should have stayed as a timberman as opposed to a tippie utility man?

A. No, I didn't.

(T. 54).

After Madrid filed the grievance (after the October 22 layoff and before the October 31 layoff), Jack W. Roberts, Kaiser's Manager of Human Resources, reviewed Madrid's file and work experience and determined that a mistake had been made in assigning Madrid underground to the timberman position since such records indicated Madrid had not previously worked underground (T. 101, 102, 104-105, 112, 131-132, 136).

According to Roberts, who was the person responsible for realigning employees during the layoffs (T. 95-97, 138, 257), placing Madrid underground after the first-- October 22-- layoff contravened Article 16 (XVI) of the union contract since Madrid

did not, according to his records, have 45 days underground experience (T. 102-103, 112, 115, 134-136, 138-142). 4/

After Mr. Roberts determined that Mr. Madrid's grievance had validity insofar as Mr. Madrid did not have suitable underground experience (T. 100, 140, 145) and should not have been assigned underground, Mr. Roberts allowed Madrid to bump to the position of tippie utilityman on the surface which had the effect of replacing an employee with less seniority who held such position--- one Willie Naranjo. 5/ Naranjo, who had underground experience (T. 106-107, 154), was moved to the timberman position which Madrid did not want (T. 101-109, 129-130, 133). Moving Madrid to Naranjo's surface position at this time was adverse to Naranjo (T. 106, 132).

4/ Thus, Article XVI, Section (f) of the National Bituminous Coal Wage Agreement of 1984 (Ex. P-12) governing the labor relationship between Kaiser and UMWA at all times material herein, provided:

New Inexperienced Employees at Underground Mines

No new inexperienced Employee in an underground mine hired after the date of this Agreement with less than forty-five (45) working days prior underground mining experience shall operate any mining machines at the face, or work on or operate any transportation equipment, mobile equipment or medium or high voltage electricity. All such new Employees shall always work in sight and sound of another Employee for a period of forty-five (45) days. During this period the new Employee shall be classified as a Trainee in order to permit him to gain maximum familiarity with the work of the mine as a whole, but to minimize exposure to hazards until more extensive experience in underground mining is achieved. At the end of the forty-five (45) working day period, he shall be eligible to bid on any vacancy that arises. Nothing in this section shall authorize any practice more permissive than that established by any applicable law or prior custom and practice.

5/ Thus, following Madrid's objection and Robert's re-evaluation of his underground experience, the following letter (Ex. D-11) to Madrid from Kaiser's General Manager, C.W. McGlothlin, Jr., dated October 24, 1986, was hand delivered to Madrid on the same date:

Dear Balt:

It has been determined that you did not have the ability to step into and perform the work of available jobs at the time of the 10-22-86 layoff. Therefore, in accordance with

At the hearing, Madrid in some contradiction to his original objection to being assigned underground, claimed that he had sufficient underground service (T. 286), although such account was extremely general (T. 50) and the amount of such time and the dates thereof are not subject to determination because of such vagueness.

The arbitrator, in his decision rejecting Mr. Madrid's grievances (Ex. D-1), incisively explained why Madrid's claim of 45 working days underground should be rejected:

The second reason advanced by the Union as to the non-applicability of Article XVI, Section (f) to the grievant was the claim that he actually had 45 working days prior underground mining experience over the course of his many years working as a surface Employee, and he would therefore not have to be classified as a Trainee if he worked underground. While the Maintenance Supervisor disputed many of the particular underground work assignments that the grievant claimed to have participated in, the weight of the evidence here was to the effect that, on a cumulative basis over the course of his 16 years at the mine, all of the individual hours on different days, when added together, would amount to 45 days sent underground. The question, however, is whether it is proper to consider that kind of work experience as meeting the requirements of Article XVI, Section (f). In my view, the contractual requirement of 45 working days prior underground mining experience is not met in such a casual manner. Crediting an hour or two here and there, along with some eight hour days which may be separated by weeks, months or even years, so as to add up to a total of 45 days, when there is not indication that there was ever any briefing on such things as the underground facilities, the procedures for entering and leaving the mine, the procedures regarding the transportation of Em-

fn. 5 continued

Article XVII, Section (c) you are realigned to the job of Tipple Utilityman. Please report to Jim Eaquinto on Monday, October 27, 1986, for day shift.

Madrid never actually worked in the timberman position underground, and he worked on the surface for the 2-day interim period between the "mistaken" timberman assignment and his bumping into Naranjo's utilityman position (T. 106, 112, 133, 145, 191, 228-230).

ployees and materials, the escape and emergency evacuation plans, a review of the mine map and the location of abandoned and dangerous areas, instructions in the use, care and maintenance of the applicable self-rescue device, instructions in the detection of methane, or any of the hazards or dangers peculiar to the underground operations, seems to be so inconsistent with the recognition that the health and safety of the Employees are the highest priorities of the parties and with their expressed agreement that the establishment of effective training programs was essential to the safe and efficient production of coal that it would defeat the intent of the parties in establishing minimum standards for the training of Employees who are inexperienced when it comes to the peculiar hazards of underground mining. It is apparent that the grievant here did not consider himself an experienced underground Employee, even though he had gone underground on a number of occasions over the course of his many years at the mine. He was the one who first expressed his concern about his lack of training for underground work when he was realigned to a timberman position at the time of the first layoff and realignment on October 22, 1986, and the Company agreed with him that it was a mistake to have put him in an underground position.

Such a casual and almost accidental or unintentional acquisition of the status of an experienced underground miner is so at odds with the intent and purpose of the safety and training provisions of the contract, provisions which were put into the contract at the Union's urging and for which the Union fought long and hard, that such a result could not have been intended. (emphasis added)

The arbitrator concluded:

... Working on the surface does not expose an Employee to the same dangers as working underground, and the surface Employee does not get the kind of first-hand knowledge that the parties wanted Employees assigned underground to have before they worked on their own.

I have no doubt that the grievant here had the necessary skill and the physical ability to perform the job duties of a timberman, but at the same time I believe that he has to be considered a anew inexperienced Employee within the meaning of Article XVI, Section (f) of the contract. That necessarily means that he would have to be classified as a Trainee during the first 45 days he was assigned to work underground and could not be classified as a Timberman and assigned to perform all of the duties of a timberman. The contract itself precludes his being considered as having

the present ability to step into and perform all of the duties of any underground job except that of Trainee. The Company's failure to recall him to the timberman job on December 15, 1986 therefore would not be considered a violation of his seniority rights, and his grievance claiming such a violation must consequently be denied.

Mr. Roberts described the decision-making process which led to Mr. Madrid's being laid off in the October 31 RIF as follows:

A. Well, we went through the same procedure, and that was before he couldn't be considered for underground jobs because he hadn't worked underground. The job that he was put on, unfortunately, the tipple utility job, was being reduced. There were two jobs and they eliminated one. The other man was senior to Mr. Madrid, so, as a consequence, he was the one eliminated.

Well, what we did, again, he was not able to take any of the underground jobs, so we started with the least senior person still working on the surface and went back up the line to see if we could find a job that he could do where he was senior to the person holding that job. And there was no such job. As a consequence, he was laid off.

(T. 118-119).

According to Mr. Roberts and other Kaiser management witnesses, even if Mr. Madrid had, or had been given, the 40-hours training required by the Act, he could not have been placed underground because of the 45-day underground work requirement of Section XVI(f) of the Wage Agreement (T. 120, 139-140, 147, 151, 165, 267).

Members of Kaiser management, including Roberts and the operations manager, did not know that there was to be a second RIF on October 31, 1986, until several days after the October 22 RIF (T. 101-107, 132, 258).

When Madrid was first realigned to the underground timberman position in the October 22 reduction, management intended to give him the 40-hour training required by the Act (T. 197, 259-261).

After Madrid was laid off on October 31, 1986, he did not, for 3 weeks, list the timberman position on the "panel form" required under the Wage Agreement which would have entitled him to consideration for assignment to that position in the event of recall (T. 109-110, 156-157, 263). Under Article XVII (c) of the Wage Agreement, a laid-off employee is required to fill out a standard form within 5 days after being laid off, and among other things, indicate the "jobs he is able to perform and for which he wishes to be recalled." From such information, the Employer prepares a "panel" form. Thus Art. XVII(d) provides:

Employees who are idle because of a reduction in the working force shall be placed on a panel from which they shall be returned to employment on the basis of seniority as outlined in section (a). A panel member shall be considered for every job which he has listed on his layoff form as one to which he wishes to be recalled. Each panel member may revise his panel form once a year.

Management officials held a meeting prior to each of the 2 layoffs to implement such (T. 257-258). In the second meeting for the October 31 layoff, which was held (1) after Madrid had filed his grievance, (2) protested going underground in the timberman's position, and (3) had been reassigned to the tippie utilityman position on the surface, the application of the 45-day underground working experience requirement of the Wage Agreement came up. This process was described by Kaiser's Operations Manager, Ronald O. Huges as follows:

A. It was brought up that as we went through the people had been displaced, there was a tippie utility position that was reduced; therefore, Balt had to be realigned once again. When we came to Balt's position in the seniority roster, the only position that was available was underground timberman's position, and it came up then that Balt was not, by contract, a trained miner; therefore, he went to the layoff.

Q. Now, in this meeting or any other time prior to the layoff, was the point made that he did have 45 days working experience, as required by Article 16?

A. That he did have?

Q. That he did have.

A. No.

Q. Throughout the period of time up to his layoff, what was your understanding as to whether he did or did not have experience?

A. I'd understood that he did not have the underground experience.

(T. 264)

The record indicates and it is found that Madrid did not have the 45 days of underground experience contemplated and required by the Wage Agreement and this was Kaiser's basis and business justification for laying him off in the October 31 RIF and for not realigning him to an underground position at that time ahead of others having such experience.

Discussion

In order to establish a prima facie case of prohibited discrimination under Section 105(c) of the Act, a complainant bears the burden of proving (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. Secretary on behalf of David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-2800 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Thomas Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). See also Eastern Assoc. Coal Corp. v. FMSHRC, 813 F.2d 639, 642 (4th Cir. 1987), Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir. 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving Commission's Pasula-Robinette test). Cf. NLRB v. Transportation Management Corp., 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act.)

If the complainant does not establish that he engaged in a protected activity, the discrimination complaint must fail. The insistence of a complainant on the right to be provided training is activity protected by the Act. Thus, the question arises whether under the Mine Act Complainant Madrid had a protected right to the training at issue here.

In Peabody Coal Co., 7 FMSHRC 1357, 1363 (September 1985), and Jim Walter Resources, 7 FMSHRC 1348 (September 1985), aff'd sub nom. Brock v. Peabody Coal Co., 822 F.2d 1134 (D.C. Cir. 1987), the Commission concluded that mine operator policies to bypass for rehire laid-off individuals because those individuals lacked current safety and health training required by the Mine Act did not constitute discrimination under the Mine Act. The Commission determined that Section 115 of the Act grants training rights to "new miners" and that laid-off individuals do not become entitled to the training rights of Section 115 until they are rehired as miners. Thus, since there is no statutory right to operator--provided training for those on lay off status, an operator's refusal to rehire a laid-off individual due to lack of required training does not violate the Mine Act.

In Peabody and in Jim Walter the Commission stressed that the Mine Act is a health and safety statute, not an employment statute. The Commission noted that in enacting Section 115 Congress was concerned with preventing "the presence of miners ... in a dangerous mine environment who have not had ... training in self-preservation and safety practices." S. Rep. No. 181, 95th Cong., 1st Sess. 50 (1977), reprinted in Senate Subcommittee

on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 637-38 (1978). The Commission determined that the rights of particular laid-off individuals to recall, including the extent to which an operator can favor for recall fully trained persons over persons with greater length of service, properly are within the sphere of collective bargaining and arbitration. 7 FMSHRC at 1364; 7 FMSHRC at 1354.

As noted hereinabove, contrary to the position asserted by Complainant Madrid that he enjoyed a statutory or legal right to the 40-hour underground training referred to in Section 115 of the Act which purportedly would have entitled him to realignment to an underground position after the October 31, 1986 layoff, the Commission's recent decision in Kitt Energy, *supra*, emphasizes that a mine operator in implementing a reduction-in-force is not in violation of the discrimination provisions of the Act by not placing surface miners in underground positions where they failed to meet the underground experience requirements of Section 115, and by placing in such underground positions persons who by training or experience fully met Section 115 requirements. Thus, in pertinent part the Commission held:

We recognize that the complainants in the instant case, unlike the complainants in Peabody, were "miners" at the time the alleged act of discrimination occurred. This distinction, however, does not require a different result because in the crucial and controlling respect, this case and Peabody are the same. In both cases, the operator chose for placement in underground mining positions persons who by training or experience fully met the training requirement of Section 115 of the Act and the Secretary's implementing regulations. In placing trained miners underground the operator did not violate the language of the Mine Act or the safety and health objectives of the training requirements. To the contrary, the Act's purpose was fulfilled. In addition, no miner was discharged or otherwise discriminated against either because of a refusal to work without having the required training or because of a withdrawal from the mine pursuant to an order issued by the Secretary under Section 104(g) of the Act due to a lack of training. See 822 F.2d at 1147. In sum, the Secretary's argument that Section 115 of the Mine Act mandates that "training neutral" employment decisions be made by mine operators is just as wide of the mark in the present situation as it was in Peabody, and must be rejected here for the same reasons.

In order to reach the result argued for by the Secretary and the UMWA, we would be required to go beyond the Act and examine the Wage Agreement. It is not the Commission's

province, however, to interpret the rights and obligations mandated by the Act through an interpretation of a private contractual agreement unless required to do so by the Act itself. Peabody, supra, 7 FMSHRC at 1364. In holding that the complainants as "miners" had the right to whatever training was required to continue their employment, the judge misperceived the proper focus of Section 115. To require an operator to train miners for underground work so that they, rather than other miners, would have the opportunity for continued employment would transform Section 115 from a health and safety provision to an employment provision. This type of employment issue is appropriately resolved through the collective bargaining and grievance and arbitration process. Indeed, the issue of the validity of Kitt's experienced miner policy was pursued through the contractual grievance process and Kitt's position was upheld.

Kaiser's witnesses, including Roberts who was the member of management primarily responsible for realignment and layoff decisions in the RIFs, convincingly established that the motivation for not placing Madrid in an underground position after the October 31 layoff was because of the application of the 45-day underground experience requirement of the Wage Agreement--not the Mine Act's 40-hour training requirement. ^{6/} Mr. Madrid was actually assigned underground after the first RIF on October 22, at which time his objective to remain as a lineman on the surface became clear. He immediately filed a grievance and raised the question as to his qualifications in terms of underground experience to work underground. At this time, at his own instance, he was placed in the tippie utilityman position on the surface--bumping another miner from such position. When this transaction took place the record is clear that management had no knowledge or indication that a second RIF was coming on October 31. Complainant failed to establish by the preponderance of the reliable and substantive evidence of record that Kaiser was

^{6/} There is no persuasive or probative evidence in the record that Kaiser attempted to avoid the training requirements of Section 115. Contrary to Complainant's contention in this regard, i.e., that Kaiser removed Madrid from the timberman position to avoid such 40-hour training, when Kaiser realigned him to timberman after the October 22 RIF, it clearly planned to arrange for Madrid to receive such training (T. 48-49, 56, 104, 116, 190-192, 197, 229-231, 259-261). There is no evidence of Kaiser management being antagonistic to the Mine Act's training requirement or that management personnel or other employees were advised to avoid or ignore such requirements (Ex. D-4, T. 57, 172-173, 196-197, 230, 233-234, 260).

motivated in its actions vis a vis Madrid from either hostility to the Act's training requirements or other discriminatory frame of mind. 7/

It is concluded that Complainant did not establish a violation under Section 105(c) of the Act and that the Complaint herein is without merit.

ORDER

Complainant having failed to establish Mine Act discrimination on the part of Respondent, his complaint is DISMISSED.

Michael A. Lasher, Jr.
Michael A. Lasher, Jr.
Administrative Law Judge

7/ Although at the hearing Madrid raised the question that one member of management, Pete Palacios, an outside Surface Superintendent, may have seen the layoffs as a means of retaliating against Madrid, there was no nexus established between any such purported animosity on Palacios' part and any safety activity on Madrid's part or connection to the Act's training requirements. Again, the record is clear that Palacios played no part in the personnel decisions (layoffs and realignments) made during the subject October RIFs.

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/bls

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 19 1988

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. VA 88-9
Petitioner	:	A.C. No. 44-04517-03595
v.	:	
	:	Docket No. VA 88-10
GARDEN CREEK POCAHONTAS	:	A.C. No. 44-04517-03596
COMPANY,	:	
Respondent	:	Docket No. VA 88-11
	:	A.C. No. 44-04517-03598
	:	
	:	Virginia Pocahontas No. 6 Mine

DECISION

Appearances: Mary K. Spencer, Esq., Office of the Solicitor,
U.S. Department of Labor, Arlington, Virginia for
Petitioner;
Marshall S. Peace, Esq., Assistant General Counsel,
Island Creek Corporation, Lexington, Kentucky for
Respondent.

Before: Judge Melick

These cases are before me upon the petitions for civil penalties filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," charging the Garden Creek Pocahontas Company (Garden Creek) with 18 violations of the regulatory standard at 30 C.F.R. § 50.20(a) for the failure to report certain alleged occupational injuries to the Federal Mine Safety and Health Administration (MSHA). The general issue before me is whether Garden Creek violated the cited regulatory standard in any of these cases, and, if so, the appropriate civil penalty to be assessed in accordance with section 110(i) of the Act.

At hearing the Secretary moved for the approval of a settlement agreement with respect to four of the citations at bar, Citation Nos. 2758998, 2759549, 2759650, and 2759655. She has submitted sufficient information to show that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. Accordingly an order will be incorporated in this decision approving the proposed settlement and directing payment of \$80 in penalties for the cited violations.

The specific issue before me in the 14 remaining citations is whether the injuries suffered by the miners were "occupational

injuries" which Garden Creek was required to report to MSHA pursuant to the regulatory standard at 30 C.F.R. § 50.20(a). That standard provides in relevant part as follows:

Each operator shall maintain at the mine office a supply of MSHA mine accident injury and illness report form 7000-1 ... each operator shall report each accident, occupational injury or occupational illness at the mine ... the operator shall mail completed forms to MSHA within 10 working days after an accident or occupational injury occurs or an occupational illness is diagnosed.

The specific facts surrounding the alleged violations are not in substantial dispute and are set forth below:

Citation No. 2758999

Miner Leonard Mitchell was injured at the No. 6 Mine on September 14, 1987. He was attempting to lift a heavy object when he strained something in his lower right side. As a result of this injury Mitchell visited a physician who diagnosed abdominal muscle strain, prescribed Flexeril 10 mgs., (a muscle relaxer), and applied heat to the affected area.

Citation No. 2759648

Miner Van E. Smith was injured at the No. 6 Mine on January 8, 1987. He was apparently beating on a rock dust hose to loosen clogged dust, and accidentally got rock dust in his eye. As a result of this injury Smith visited a physician who diagnosed chemical conjunctivitis in the left eye. The physician prescribed Poly-Pred for several days.

Citation No. 2759651

Miner Jerry L. Barrett was injured at the No. 6 Mine on March 3, 1987. Barrett had bent over to pick up an object that was frozen to the ground and injured his shoulder. As a result of this injury Barrett visited a physician who diagnosed right intrascapular strain, and prescribed Soma Compound (a pain reliever and muscle relaxer) and Darvocet (a pain reliever).

Citation No. 2759652

Miner Phillip Keene was injured at the No. 6 Mine on March 10, 1987. Keene was tightening a bolt using his foot for leverage, and sprained his right knee. As a result of this injury Keene visited a physician who diagnosed right knee sprain, wrapped the knee in an Ace bandage and prescribed Motrin (a pain reliever).

Citation No. 2759653

Miner Kenneth R. Hicks was injured at the No. 6 Mine on March 10, 1987. Hicks was attempting to lift a heavy object when he felt a pain in his right chest. As a result of this injury Hicks visited a physician who diagnosed musculoskeletal strain of the chest wall, took an x-ray, and prescribed Tylenol No. 3 (a pain reliever) and Soma Compound (a muscle relaxer and pain reliever).

Citation No. 2759654

Miner Bobby L. Richardson was injured at the No. 6 Mine on March 16, 1987. Richardson was attempting to remove a pipe from machinery when the pipe came loose and crushed his left index finger. As a result of this injury Richardson visited a physician who diagnosed a crushing injury to the left index finger, took an x-ray, cleaned and bandaged the finger, applied a cold pack, and prescribed Darvocet (a pain reliever). Richardson had the prescription filled and used the medication.

Citation No. 2759657

Miner David Crouse was injured on May 5, 1987 at the No. 6 Mine. Crouse accidentally struck the back of his left hand with a hammer. As a result of this injury Crouse visited a physician who diagnosed a contusion of the left wrist and hand. The physician took an x-ray of the hand and prescribed Motrin (a pain reliever). Crouse had the prescription filled and used the medication.

Citation No. 2759659

Miner Randall F. Skeens was injured at the No. 6 Mine on June 24, 1987. As Skeens was exiting a bus he strained his back. As a result of this injury Skeens visited a physician who diagnosed musculo-skeletal strain. The doctor recommended rest, application of a heating pad, and prescribed Flexeril (a muscle relaxer).

Citation No. 2759658

Miner Larry D. Hale was injured at the No. 6 Mine on May 8, 1987. Hale was attempting to return a rock dust car onto the track with a bar when he strained his back. As a result of this injury Hale visited a physician who diagnosed acute lumbosacral strain and prescribed Soma Compound (a pain reliever and muscle relaxer).

Citation No. 2288707

Miner Linda Lester was injured at the No. 6 Mine on February 5, 1987. Lester was lifting cribs overhead to hand them to a miner standing on a ladder and strained her back. Lester visited a doctor as a result of this injury. The doctor diagnosed left paralumbar muscle strain, recommended a heating pad and rest, and prescribed Nalfon 600 mg. (a pain reliever).

Citation No. 2288708

Miner Billy R. Lester was injured at the No. 6 Mine on May 20, 1987. Lester had lifted a bucket and felt a sharp pain in his left shoulder. As a result of this injury Lester visited a doctor who diagnosed a sprain of the left shoulder, gave Lester a steroid injection and prescribed Motrin (a pain reliever). Lester had the prescription filled and used the medication.

Citation No. 2288709

Miner Clarence Auville was injured on May 12, 1987 at the No. 6 Mine. Auville apparently was lifting a motor when he developed pains in his right side. As a result of this injury Auville visited a physician who diagnosed acute back strain, x-rayed Auville, and prescribed Flexeril (a muscle relaxer).

Citation No. 2288711

Miner Michael J. Lester was injured at the No. 6 Mine on September 1, 1987. While Lester was riding in a mine buggy he hit his head against the canopy and sustained a neck injury. As a result of the injury Lester visited a doctor who diagnosed a contusion to the head, severe sprain of the neck, and an axial compression injury of the neck. Lester was "given therapy" and was also x-rayed and given a prescription for valium (a medication for management of "anxiety disorders" and also for the relief of skeletal muscle spasm).

Citation No. 2759660

Miner Harvey Keith Keene was injured at the No. 6 Mine on June 22, 1987. Keene was lifting a bucket and apparently pulled a groin muscle. As a result of this injury Keene visited a doctor who diagnosed acute right groin muscle strain and applied an ice pack compress on the injured area with directions to apply a warm compress after 24 hours. The doctor prescribed Valium (a medication for management of "anxiety disorders" and for relief of skeletal muscle spasms).

The parties also agreed to the following stipulations:

With regard to each of the subject citations, the injury referred to in the body of the citation was to a miner and occurred at a mine, for the purposes of 30 C.F.R. § 50.2(e).

With regard to each of the subject citations, the medication referred to in the body of the citation was a prescription medication; a written prescription for that medication was given to the individual by a physician during the course of an office visit.

With regard to Citation Nos. 2759654 and 2759657 (Docket No. VA 88-9), and Citation No. 2288708 (Docket No. VA 88-11), it is stipulated that the prescription was filled and the medication was taken by the individual to whom it was prescribed.

The injuries referred to in each citation were not in fact reported to MSHA within 10 working days of occurrence, pursuant to 30 C.F.R. §§ 50.20 and 50.20-1.

Respondent abated each violation by completing MSHA Form 7000-1 entitled "Mine Accident, Injury, and Illness Report," and mailing it to MSHA.

MSHA Guidelines (government Exhibit Nos. 15 and 16) from 1980 and 1986 constitute MSHA's interpretations of the Part 50 regulatory reporting requirements.

The injuries referred to in the subject citation, if they are in fact reportable, would be reportable as a result of the use of a prescription medication and not for any other medical reason.

As previously noted, 30 C.F.R. § 50.20(a) requires a mine operator to mail a report for each "occupational injury" to MSHA within ten days after the injury occurs. The regulation at 30 C.F.R. § 50.2(e) defines the term "occupational injury" as "any injury to a miner which occurs at a mine for which medical treatment is administered or which results in death or loss of consciousness, inability to perform all job duties on any day after injury, temporary assignment to other duties, or transfer to another job".

"Medical treatment" which, if administered, renders an injury an "occupational injury" and thus reportable to MSHA, is distinguished from "first aid" at 30 C.F.R. § 50.20-3(a):

(a) Medical treatment includes, but is not limited to, the suturing of any wound, treatment of fractures, application of a cast or other professional means of immobilizing an injured part of the body, treatment of infection arising out of an injury, treatment of bruise by the drainage of blood, surgical removal of dead or damaged skin (debridement), amputation or permanent loss of use of any part of the body, treatment of second and third degree burns. Procedures which are diagnostic in nature are not considered by themselves to constitute medical treatment. Visits to a physician, physical examinations, x-ray examinations and hospitalization for observation, where no evidence of injury or illness is found and no medical treatment given, do not in themselves constitute medical treatment. Procedures which are preventive in nature also are not considered by

themselves to constitute medical treatment. Tetanus and flu shots are considered preventative in nature. First aid includes any one time treatment and follow-up visit for the purpose of observation of minor injuries such as cuts, scratches, first degree burns and splinters. Ointments, salves, antiseptic, and dressing to minor injuries are considered to be first aid.

It is not disputed in these cases that the medications noted in each of the 14 remaining citations was a medication for which a prescription was written during the course of a visit to a physician's office.

The Secretary maintains that she has consistently construed the term "medical treatment" to include cases where a prescription medication is used, except where "a single dose or application of a prescription medication is given on the first visit merely for relief of pain or as a preventive treatment for a minor injury." According to the Secretary this interpretation was initially articulated in a 1980 Information Report on Part 50, of her regulations and was reiterated in a 1986 revision of the Report (Ex. G-15 and G-16).

The Secretary observes that section 50.20-3(a) provides that medical treatment includes, but is not limited to, the examples given. The regulation provides that "...[v]isits to a physician, physical examinations, x-ray examinations... do not in themselves constitute medical treatment ...where no evidence of injury or illness is found...". The Secretary notes that the physicians here rendered a specific diagnosis of injury and, as a result of the injury, prescribed medication. She also observes that none of the charges in the citations at bar fall within the "single-dose" exception.

If the Secretary's proffered interpretation of the cited standard is applied hereto (i.e. the 1980 Information Report on part 50 and the 1986 revision of the report) then the use of the prescribed medication would no doubt constitute "medical treatment" within the meaning of part 50 and render the injury an "occupational injury" reportable to MSHA under the provisions of 30 C.F.R. § 50.20(a). The Secretary maintains that her views on this interpretation of her regulations are entitled to controlling weight unless plainly erroneous or inconsistent with the regulation, citing Eula v. Tallman 380 U.S. 1 (1965) and Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, (D.C. Cir. 1986), as authority.

Garden Creek argues on the other hand that the Secretary's proffered interpretation of the term "medical treatment" is indeed inconsistent with her regulations and accordingly should not be given any weight. This argument is premised on the fact that the regulations, at section 50.20-3, explicitly set forth only one situation (in the case of eye injuries) in which the use of

prescription medication in itself constitutes "medical treatment". According to the Garden Creek argument, it may therefore reasonably be inferred that MSHA considered and rejected the inclusion of the use of other prescription medications alone as sufficient to constitute "medical treatment" for any other injury. Garden Creek further argues that MSHA has attempted to improperly expand the scope of her regulations through the use of an "informational report" and, implicitly, the procedural requirements for the promulgation of regulations set forth in Section 101(a) of the Act and in section 553 of the Administrative Procedure Act.

The Respondent's position is clearly the more persuasive. Under the doctrine expressio unius est exclusio alterius, the specific mention of one thing in a statute or regulation implies the exclusion of other things not mentioned. Public Service Co of Colorado v. FERC, 754 F2d 1555 (10th Cir. 1985); Tom v. Sutton, 533 F2d 1101 (9th Cir. 1976); See also Sutherland Stat Const. § 47.23 and § 31.06 (4th Ed). In section 50.20-3(a)(5)(ii) the Secretary has stated in plain and unambiguous language that treatment of only one specific type of injury (i.e. eye injuries) by use of a prescription medicine would constitute "medical treatment" of that injury within the meaning of Part 50. Thus by specifically mentioning in her regulations that the treatment of eye injuries by use of a prescription medicine constitutes "medical treatment" for purposes of the Part 50 reporting requirements, the Secretary has implicitly excluded the treatment of all other injuries by use of prescription medicine alone from the term "medical treatment" under Part 50.

The Secretary's attempted amendment through "informational reports" is thus clearly erroneous and inconsistent with her regulations. Such an amendment must comport with the procedural requirements of section 101(a) of the Mine Act and Section 553 of the Administrative Procedure Act. Since the Secretary has conceded that the injuries referred to in the citations would be reportable under Part 50 only because of the use of a prescription medication and for no other reason it is clear that all of the remaining 14 citations except Citation No. 2759648, must fail.

Citation No. 2759648 is unique in that it involves an eye injury for which a prescription was written. Under section 50.20-3(a)(5)(ii) "medical treatment" for eye injuries includes removal of imbedded foreign objects, the use of prescription medications or other professional treatment. In this case the evidence shows that a miner, Van Smith, suffered an eye injury at the No. 6 Mine on January 8, 1987, while beating on a rock dust hose. As a result of this injury Smith visited a physician who diagnosed chemical conjunctivitis of the left eye and prescribed Poly-Pred.

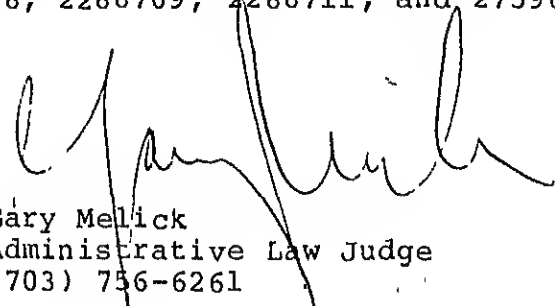
Respondent argues however that in accordance with the regulatory language the Secretary has the burden of proving that a prescription medication was actually used by the miner and that the

Secretary has failed in her burden in that regard. In support of its position, Respondent notes that although it has been stipulated that the prescription in this case, Poly-Pred, was written by the physician the evidence does not show that the miner actually used the medication. Indeed the evidence shows that this miner did not seek reimbursement for this prescription pursuant to his insurance coverage.

The Secretary argues that it may nevertheless be inferred that the medicine was used on the basis that the prescription was written by the physician. However an inference cannot be raised from a proven fact unless a rational connection exists between such fact and the ultimate fact presumed. Moreover an inference may not be drawn from one occurrence to another that is not specifically connected merely because the two resemble each other, but must be linked by the chain of cause and effect and common experience. See 29 Am Jur 2d Evidence § 162. There is no such linkage here and the proposed inference cannot therefore be made. I therefore conclude that the Secretary has not met her burden of proving that the prescriptive medicine was actually used in this case. Even assuming, arguendo, that the inference were permitted, I find that this evidence would in any event be outweighed by the inference of non-use arising from the failure of the miner to have applied for reimbursement for purchase of the prescription. Accordingly Citation No. 2759648 must in any case be vacated for insufficient evidence.

ORDER

Citation Nos. 2758998, 2759549, 2759650, and 2759655 are affirmed. Garden Creek Pocahontas Company is directed to pay a civil penalty of \$80 with 30 days of this decision. Citation Nos. 2758999, 2759648, 2759651, 2759652, 2759653, 2759654, 2759657, 2759658, 2759659, 2288707, 2288708, 2288709, 2288711, and 2759660 are vacated.



Gary Mellick
Administrative Law Judge
(703) 756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

AUG 22 1988

CHARLES H. SISK,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 87-212-D
	:	MADI CD-87-3
E. R. MINING, INC.,	:	
D.B.A. E. R. TRUCKING, CO.,	:	Charolais No. 1 Mine
Respondent	:	

DECISION

Appearances: Daniel N. Thomas, Esq., Thomas & Ison, P.S.C.,
Hopkinsville, Kentucky for Complainant;
Pam Corbin, Esq., Little & Corbin, Madisonville,
Kentucky for Respondent.

Before: Judge Melick

This case is before me upon the complaint by Charles H. Sisk under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," alleging that he was discharged by E. R. Mining, Inc., (E.R.) in September 1986 in violation of section 105(c)(1) of the Act.^{1/}

1/Section 105(c)(1) of the Act provides as follows:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment, has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such representative of miners or applicant for employment has instituted or caused to be instituted any proceedings under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

In order to establish a prima facie violation of section 105(c)(1) Mr. Sisk must prove by a preponderance of the evidence that he engaged in an activity protected by that section and that his discharge was motivated in any part by that protected activity. Secretary on behalf of Pasula v. Consolidation Coal Co. 2 FMSHRC 2786 (1980) rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (1981). A miners "work refusal" is protected under section 105(c) of the Act if the miner has a good faith, reasonable belief in the existence of a hazardous condition. Miller v. FMSHRC, 687 F.2d 194 (7th Cir. 1982); Robinette, supra. The case law addressing work refusals also contemplates some form of conduct or communication manifesting an actual refusal to work. See e.g. Sammons v. Mine Services Co., 6 FMSHRC 1391 (1984).

In this case the Complainant, Mr. Sisk, alleges that on September 23, 1986, at approximately 4:00 p.m. he was fired for refusing to operate a truck which he considered unsafe in that it purportedly had no brakes.

The evidence shows that after his arrival at work around 4:00 p.m., on September 23, 1986, Mr. Sisk asked contract mechanic Bill Rider to adjust the brakes on one of the haulage trucks. Adjusting the brakes on these trucks is relatively simple, requires only 5 to 10 minutes and is a procedure that many of the drivers perform themselves. According to Rider, Sisk knew or should have known because of his experience as a truck driver, of the simplicity and brevity of the procedure. As Rider was nearly finished adjusting the brakes on the one truck Sisk reappeared, told Rider that he was working on the wrong truck and asked Rider to then adjust the brakes on another truck identified as "Uke 51". Rider responded that he would "get to it in a minute". According to Rider, Sisk was "loud and abrasive" used profanity and was "awfull ill" toward him. Rider completed the brake adjustment on truck No. 51 in about 10 minutes but Sisk never returned.

Although Rider believed that the brakes on truck No. 51 needed no adjustment he nevertheless tightened them to satisfy Sisk. He observed that the truck had been driven the previous Saturday, Monday and earlier that same day and he received no

complaints about the brakes. Rider concluded moreover that Sisk could not have known the condition of the brakes that afternoon because he had not yet even driven the truck.

According to the joint stipulations of fact submitted in this case, upon being told by Rider that he would complete the brake adjustment on the first truck before proceeding to the second truck, the Complainant "lost his temper and began complaining to Tommy Beddow [the day shift foreman] in a loud and excited voice about working conditions, including the conditions of the brakes." According to the stipulations the following then occurred:

Claimant left the area in which Mr. Rider was working and approached Tommy Beddow, complaining that the brakes were bad on the spare truck but instead of working on it, Mr. Rider was working on another truck. Claimant told Tommy Beddow that, in the condition that the brakes were in, the risk existed that he could run the spare truck into a piece of equipment or an employee because of his inability to stop it. Claimant was loud and abrasive in his speech toward Tommy Beddow and as he did not want claimant operating the spare truck in the mood that he was in, claimant then went to talk to mine superintendent, Jimmy Beddow, and he sent claimant home. Claimant asked him if he were to return the next day and Mr. Beddow told him that he would be contacted. Claimant was discharged on September 25, 1986.

Thomas Beddow testified that he had just emerged from the pit area upon completion of the first shift and pulled up to the truck area when Sisk began complaining angrily that Rider was adjusting the brakes on the wrong truck. Sisk was in a "bad mood" and was "pretty upset". Sisk yelled at Beddow that he was "going to kill somebody" if he had to run the truck without brakes and Beddow yelled back "well don't get in it and don't run it". According to Beddow, Sisk never refused to drive the haulage truck but suddenly drove off in his own truck. Beddow claims that he neither fired Sisk nor told him to go home. He assumed that by driving off the job Sisk just quit.

Later, Mine Superintendent James Beddow reported that Sisk had asked him if he was to return to work the next day as if there was no other work for him that day. A day or so later there was meeting at which James Beddow told Sisk he was "not going to have someone tell him when and how to operate his business." According to Thomas Beddow, Sisk had a bad attitude,

would drive the trucks too fast, would "drowse-off" on the job, and was frequently "run down and tired" apparently from working two jobs.

James Beddow testified that Sisk was "an average worker" but often drove too fast, would sleep on the job and was generally worn out. According to Beddow, Sisk did not wait long enough to find out what other work was to be done but rather was already prepared to leave the job. James Beddow met with Sisk on the 25th of September and then discharged him primarily because of Sisk's "attitude with his employees". Beddow did not want Sisk to "get away with" talking to his employees and supervisors in an abusive manner.

Sisk testified that under normal preoperation procedures the drivers test the brakes on the way to the pit. If the brakes are then working properly management would be asked to adjust them. Because of a tire blow-out on his regular truck (No. 56) a week earlier, Sisk had been assigned truck No. 51. Sisk claims that he had driven truck No. 51 the previous Friday, Saturday and Monday, and found that "there weren't any brakes on it". According to Sisk, truck No. 51 had on three prior occasions backed over the edge of the pit area because of inadequate brakes. He purportedly complained of this to both of the Beddow brothers. Sisk also claims that on the day before the 23rd the brakes were still inadequate.

On September 23rd, Sisk was at the job site a few minutes before his 4:00 p.m. shift. Sisk says that he asked Rider to adjust the brakes on one truck but later realized it was the wrong truck. Rider told him he would adjust the brakes on the second truck in "just a minute." Sisk nevertheless complained to Beddow that the adjustment would not help even though the brakes were admittedly out of adjustment. Sisk maintains that he told Beddows that he "really did not want to run the truck until the brakes were fixed" but does not claim that he was told to drive the truck before the adjustment. Tommy Beddow reportedly then told him to get "the hell out of here and don't come back" Sisk did not ask for alternative work. When he reappeared for the meeting on September 25th, Tommy Beddow said "he could not have anybody tell him how to run his business and needed a man who would give him 100 percent".

Sisk testified that he had never been insubordinate but admitted talking in a loud voice because he was purportedly wearing ear plugs. On cross examination Sisk admitted that it was company policy to note any problems on your vehicle on your time card or tell management of the problem. He claims that he

did not follow this procedure on September 22nd because no action had been taken on his reporting a defective tire on truck No. 56 and he did not believe it would do any good. He also claims that management was told about the defective brakes so there was no reason to write it down. Sisk explained that on September 23rd he thought an adjustment of the brakes on truck 51 would however correct the problem.

According to Roy Poole, Sisk's supervisor on the second shift, truck No. 51 was to be checked out by Sisk before it was operated and if any problems developed the procedure would be to report them to Poole. Sisk never did report any brake problems to Poole nor to anyone else between September 20 and September 23. Poole denied that Sisk had had any problems backing into soft ground at the pit area around this time but rather those problems had occurred when he first started on the job months earlier.

Poole was also at the job site on Tuesday, September 23rd, before the shift began. He directed Sisk to drive truck No. 51 and Sisk asked if he could drive one of the other trucks. Poole advised Sisk that "just because you are a senior man you don't get to drive somebody else's truck." According to Poole, Sisk was cursing and proceeded to the area where Rider was working. Poole later again talked to Sisk and Sisk again requested to drive another truck. Poole acknowledged that truck No. 56 was a better truck with better brakes and a better engine but that it was then being repaired. Poole testified that Sisk never complained about truck No. 51 being unsafe but complained that it was "a damn pile of junk". Poole had had problems with Sisk sleeping on the job and noted that he was often completely exhausted. On occasion he had to remind Sisk to slow down.

Within this framework it is apparent that there is not even sufficient evidence to show that the Complainant engaged in a work refusal. According to the credible testimony of the day shift foreman, Thomas Beddow, Sisk angrily approached him as the second shift was about to begin on September 23rd, and complained that the mechanic was adjusting the brakes on the wrong truck. At one point Sisk, yelled at Beddow that he was going to kill somebody if he drove the truck and Beddow responded--"well don't get in it and don't run it". Shortly thereafter and without determining whether the brakes on his assigned truck had been adjusted Sisk just drove off the premises in his own truck.

In any event, even assuming, arguendo, that Sisk did refuse to drive the subject truck it is clear that he could not have then entertained either a reasonable or a good faith belief that

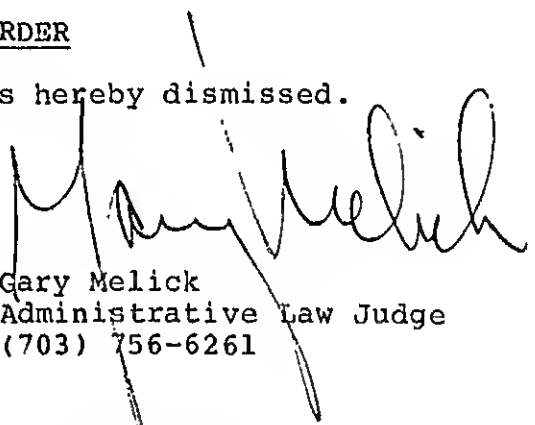
it would have been hazardous to do so. Sisk admitted that it was standard company procedure for the drivers to test the brakes on any vehicle on the way to the pit and at that point if they were not working properly management would be asked to correct the problem. It is undisputed in this case that not only had Sisk not yet driven the truck that day in accordance with normal brake test procedures but that he had not checked the subject brakes in any way.

Moreover Sisk had asked the mechanic to adjust those brakes and the mechanic had agreed to do so. Rather than wait until the brakes had been adjusted and tested, Sisk prematurely confronted Thomas Beddow with his complaints. This led to a heated exchange and Sisk's voluntary departure from the mine site. Sisk could not, however, have then entertained either a good faith or a reasonable belief that the truck would have been hazardous to drive since he had not tested the brakes and the brake adjustment had not been completed at the time of his alleged work refusal.

Under the circumstances Sisk has not established a prima facie violation of section 105(c)(1) of the Act and this case must therefore be dismissed.

ORDER

Docket No. KENT 87-212-D is hereby dismissed.



Gary Melick
Administrative Law Judge
(703) 756-6261

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

August 22, 1988

TROY W. CONWAY, SR.,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. KENT 88-128-D
v.	:	MADI CO 88-03
	:	
PEABODY COAL COMPANY,	:	
Respondent	:	
	:	

ORDER OF DISMISSAL

Before: Judge Merlin

On May 4, 1988, you filed with this Commission a complaint of discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977. On June 15, 1988 a show cause order was issued directing you to provide information regarding your complaint or show good reason for your failure to do so. The show cause was mailed to you certified mail, return receipt requested and the file contains the signed receipt card showing you received the show cause order. You have however, not responded and complied with the show cause order.

Accordingly, this case is DISMISSED.



Paul Merlin
Chief Administrative Law Judge

Distribution:

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Peabody Coal Company, 68-H, R.R. #1, Waverly, KY 42462
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041

AUG 26 1988

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 87-128-D
ON BEHALF OF	:	
MICHAEL L. PRICE AND	:	No. 4 Mine
JOE JOHN VACHA,	:	
Complainants	:	
v.	:	
	:	
JIM WALTER RESOURCES, INC.,	:	
Respondent	:	
and	:	
UNITED MINE WORKERS OF	:	
AMERICA (UMWA),	:	
Intervenor	:	

SUPPLEMENTAL DECISION

Appearances: Frederick W. Moncrief, Esq., and Thomas A. Mascolino, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for the Secretary of Labor and Complainants; Robert K. Spotswood, Esq., and John W. Hargrove, Esq., Bradley, Arant, Rose & White, Birmingham, Alabama, for Respondent; Robert H. Stropp, Esq., and Patrick Nakamura, Esq., Stropp & Nakamura, Birmingham, Alabama, for Intervenor, and Complainants.

Before: Judge Broderick

On July 13, 1988, I issued a decision on the merits in this case in which I concluded that complainants Michael L. Price and Joe John Vacha were discharged by Jim Walter Resources Inc. (JWR) in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977. I ordered the reinstatement of Price and Vacha to the positions from which they were discharged on March 2, 1987. I also ordered JWR to pay back wages and other benefits to Price and Vacha from March 3, 1987, until the date of their reinstatement with interest. I directed counsel to attempt to agree upon the amounts due complainants under this order.

On August 19, 1988, the parties filed a joint submission in which they agreed on the amounts due under my order as back pay

and miscellaneous expenses to each of the claimants. The parties disagree as to whether complainants are entitled to one hour's pay for the time spent after the completion of their shift on March 2, 1987, when JWR ordered them to provide a urine sample. Vacha claims and JWR denies reimbursement for costs and attorneys' fees assessed in a lawsuit filed against him on an overdue account.

When a violation of section 105(c) is found, the statute directs the Commission to require such affirmative action to abate the violation as it deems appropriate. Appropriate affirmative action may include back pay, interest, reimbursement for damages or expenditures related to the unlawful discharge, a cease and desist order and a civil penalty for the violation of the Act.

Respecting the claim for one hour's pay for part of the time complainants spent on company property after being ordered to provide a urine specimen, the Secretary and JWR each relies on a different arbitrator opinion. In one opinion, the arbitrator held that employees who were tested under the program during nonworking hours were entitled to up to one hour's pay at overtime rates. In a later opinion, the arbitrator held that Price and Vacha were not entitled to pay for the time spent (4-1/2 hours) on company property after they were directed to provide urine specimens on March 2, 1987. It is not my function to interpret the collective bargaining contract or to reconcile arbitrator opinions. I must decide whether the claim is related to the discriminatory discharge. No wages were lost; no money was expended. The unlawful discharge did not occur until after the time for which the claim is made expired. I conclude that reimbursement for one hour of that time is not related to the unlawful discharge, and I deny that portion of the claim.

There is no evidence in the record to show that the expenses incurred by Vacha in connection with his lawsuit were related to the discriminatory discharge, and I deny that portion of his claim.

ORDER

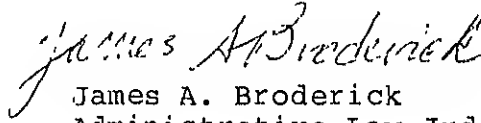
1. The findings, conclusions and order incorporated in my decision of July 13, 1988, are REAFFIRMED.

2. Respondent is ORDERED to pay complainant Price within 30 days of the date of this order the sum of \$8,411.86 as back pay and expenses, with interest thereon in accordance with the Bailey v. Arkansas Carbona formula, calculated proximate to the time payment is actually made.

3. Respondent is ORDERED to restore to Price the three days of graduated vacation pay he took to attend the hearing.

4. Respondent is ORDERED to pay complainant Vacha within 30 days of the date of this order the sum of \$6881.47 as back pay and expenses, with interest thereon in accordance with the Bailey v. Arkansas Carbona formula, calculated proximate to the time payment is actually made.

5. Respondent is ORDERED to pay to the Secretary within 30 days of the date of this order the sum of \$500 as a civil penalty for the violation found herein. Because I concluded that the substance abuse program was facially in violation of the Act, I treat it as a single violation. Because I concluded that JWR did not intend to diminish the rights and responsibilities of miners' representatives, I have reduced the amount of the penalty. (The Secretary requested a \$2000 penalty for each of two violations.)


James A. Broderick
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 31 1988

DAVID LEE JACK,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. PENN 88-138-D
	:	
THE HELEN MINING COMPANY,	:	PITT CD 87-15
Respondent	:	
	:	Homer City Mine
	:	

DECISION

Appearances: Marvin Stein, Esq., Kuhn, Engle & Stein,
Pittsburgh, Pennsylvania, for the Complainant;
Henry J. Wallace, Jr., Esq., Reed, Smith, Shaw
& McClay, Pittsburgh, Pennsylvania, for the
Respondent.

Before: Judge Weisberger

Statement of the Case

On February 22, 1988, Complainant filed a complaint with the Commission under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (the Act) alleging, in essence, that the Respondent took a discriminatory disciplinary action towards him, ". . . as a result of my work-related accident, absences from work, and need for ear surgery in order not to loose my hearing." An Answer was filed on March 28, 1988.

Pursuant to notice, the case was scheduled and heard in Pittsburgh, Pennsylvania, on June 22, 1988. At the hearing David L. Jack, Ronald H. Rhoades, and Layton Thrower testified for the Complainant. W. Duane Landacre and Clark McElhoes testified for the Respondent. Complainant filed its posthearing Proposed Findings of Fact and Memorandum of Law on August 10, 1988, and Respondent filed its Proposed Findings of Fact and Memorandum of Law August 12, 1988. Each Party filed a Reply on August 22, 1988.

Issues

1. Whether the Complainant has established that he was engaged in an activity protected by the Act.

2. If so, whether the Complainant's suffered adverse action as the result of the protected activity.

3. If so, to what relief is he entitled.

Findings of Fact

Stipulated Facts:

Prior to the hearing the Parties stipulated with regard to the following facts as set forth in their Prehearing Stipulation:

1. Complainant David Lee Jack ("Jack") is an adult individual residing at 431 Oak Street, Indiana, Pennsylvania, and was employed by The Helen Mining Company as a miner, as that term is defined under 30 U.S.C.A. § 802(g).

2. Respondent, The Helen Mining Company ("Helen") is a Pennsylvania corporation, a wholly owned subsidiary of the Valley Camp Coal Company and an employer in an industry affecting commerce as defined by Section 2(7) of the LMRA, 29 U.S.C.A. § 802(h)(1). Its principal place of business is in Homer City, Indiana County, Pennsylvania.

3. Jack was employed by Helen as a miner from October 10, 1978 until July 24, 1987, when he was discharged pursuant to Helen's Chronic and Excessive Absence Control Program.

4. In December 1985, Jack suffered a serious injury to his hand while at work, and was off work for the first 6 months of 1986.

5. During the latter part of 1986, Jack was injured in a shuttle car accident in the mine and missed more than 2 weeks of work.

6. In January 19 1987, Helen implemented a Chronic and Excessive Absence Control Program (the "Program") for hourly employees at the Helen Mine.

7. On January 14, 1987, Jack received a warning under the Program because he exceeded the 10 percent and six occurrence standard set forth in the Program.

8. On April 14, 1987, Jack received a Last and Final Warning under the Program.

9. On May 1, 1987, Jack underwent an ear operation.

10. Jack was absent from work approximately 11 days after his ear surgery.

11. In the 3 months following issuance of the Last and Final Warning, Jack was absent 22 percent of his scheduled workdays.

12. On July 24, 1987, Jack was discharged on the basis that he failed to correct his high rate of absenteeism under Helen's Chronic and Excessive Absentee Program.

13. On July 28, 1987, a grievance was filed on Jack's behalf protesting his termination, which grievance was submitted for resolution to Arbitrator Edward J. Sedlmeier.

14. On August 15, 1987, Arbitrator Sedlmeier issued a Decision and Award upholding Jack's termination.

15. On September 4, 1987, District 2, United Mine Workers of America, and Local 1619, United Mine Workers of America, filed a Complaint in the United States District Court for the Western District of Pennsylvania at Civil Action No. 87-1880 seeking to set aside Arbitrator Sedlmeier's Decision and Award on the grounds, inter alia, that the Decision and Award does not draw its essence from the labor agreement and is contrary to public policy.

16. On April 29, 1988, United States District Judge Alan N. Bloch issued an Order granting Helen's Motion for Summary Judgment, dismissing the Complaint and finding that Arbitrator Sedlmeier's Decision and Award draws its essence from the collective bargaining agreement and is in the bounds of established public policy.

I adopt the above stipulated facts.

Findings of Fact

During the course of his employment with the Respondent, David L. Jack worked underground as an indoor laborer operating a shuttle car which exposed him to coal dust at the face. He also ran a bolter and had to shovel to keep the belt line free of coal. He also performed construction work which was not generally at the face. In general, each work day he would be assigned by his foreman to perform any of the above tasks.

Jack, for approximately 2 years prior to May 7, had suffered from a perforated right tympanic membrane with a resulting hearing lost of 25 to 45 decibels in the right ear. In March 1987, his physician, Doctor Minoo Karanjia recommended surgery. Jack, subsequently in March 1987, informed Clark McElhoes, Respondent's Superintendent, of the pending operation and inquired whether he would be discharged if he would take off 3 days in May for an operation, and McElhoes indicated that it would not. (Jack had testified that, when informing McElhoes in March 1987, of the pending operation, he did not specify that he would need 3 days off. I have adopted the version testified to by McElhoes due to my observations of his demeanor, and due to the fact W. Duane Landacre, Respondent's Personnel Manager, testified that, in an arbitration hearing, Jack had said that he told McElhoes that he would not be taking for off more than 3 days. In this connection, I note that in the Arbitration Decision, the Arbitrator indicated that Jack, when he scheduled the operation, expected to be out of work for 3 or 4 days. (RX 7, page 14)).

As a consequence of the right tympanoplasty performed on May 1, 1987, Jack was provided with a graft in his ear. According to Jack, 2 days after the operation, he returned to the office of Doctor Karanjia and at that time the latter asked him what kind of work he did and Jack said that he worked in a coal mine. Jack indicated at that time there was no discussion with regard to Jack's returning to work. Jack further said, that at that time he obtained a slip from Doctor Karanjia, that he would be off from work and turned it in to the mine clerk, a Mr. Rooke, who did not have any supervisory functions. However, Jack indicated that he did not read the contents of the note. A note entitled "Certificate to return to work or school" dated April 29, 1987, signed by Doctor Karanjia and stamped by the Respondent on what appears to be May 1, indicates that Jack has been under the latter's care and contains the following remarks: "for surg 5/1/87 - will be off work until further notice." (RX 11).

Doctor Karanjia, in his deposition, stated, in essence, that, on April 29, 1987, Jack indicated his occupation to him. He further stated that he first saw Jack after the operation on May 6 (Deposition page 33), and then saw him again on May 13. He said that he told Jack, in essence, that he could not go and work in the mines and "it will be up to you." (Deposition 17 - 18). He explained, in essence, that the postoperative ear condition, "... is going to be effected by a lot of dust, coal dust that might go in and things might happen." (Tr. 17). He also

indicated that there is a very high possibility that a postoperative ear condition can be infected if a person goes in mines and works with dust. He provided his opinion that the postoperative condition is unsafe and Jack should have been off work for at least 3 months.

However, there is nothing in the record to establish exactly when Doctor Karanjia told Jack not to go back to work at the mines. Jack testified that, when he saw Doctor Karanjia the second time after the operation, he was examined and given a slip "to return to work" which he gave to Rooke the following day and that he continued working that day and continued working for 2 weeks. (Tr. 20, 21) Rooke, to whom Jack testified that he had given the slip from Doctor Karanjia 2 days after the operation, did not testify. According to McElhoes he did not have any contact with Jack between the time Jack had asked him if he could take time off for an operation in March or April 1987, until the arbitration proceedings subsequent to Jack's discharge. Based on the above I find that, prior to Jack's return to work after his operation on May 18, 1987, he did not notify Respondent prior to the Arbitration Proceedings, that he refused to return to work as directed by his Physician in order to avoid infection and possible loss of hearing as a consequence of exposure to dust and coal dust.

Jack testified that on July 24, he was called into Respondent's office and McElhoes informed him that he was being discharged pursuant to the chronic absentee program as his absenteeism had exceeded 10 percent. Pursuant to the procedure in this program, Jack requested a meeting with Respondent's agents which was held on July 28. At that time Jack indicated that he had returned to work 11 days after the surgery under his doctor's instructions as the latter had wanted his surgery to heal properly, had given him a slip 2 days after the surgery, and intended to keep him off work.

Discussion and Conclusions of Law

Complainant and Respondent are protected by, and subject to, the provisions of the Mine Safety Act, and specifically section 105(c) of the Act. I have jurisdiction to decide this case.

The Commission, in a recent decision, Goff v. Youghiogheny & Ohio Coal Company, 8 FMSHRC 1860 (December 1986), reiterated the legal standards to be applied in a case where a miner has alleged acts of discrimination. The Commission, Goff, supra, at 1863, stated as follows:

A complaining miner establishes a prima facie case of prohibited discrimination under the Mine Act by proving that he engaged in protected activity and that

the adverse action complained of was motivated in any part by that activity. Pasula, 2 FMSHRC at 2797-2800; Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by protected activity. Robinette, 3 FMSHRC at 818 n. 20. See also Donovan v. Stafford Constr. Co., 732 F.2d 954, 958-59 (D.C. Cir 1984); Boich v. FMSHRC, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's Pasula-Robinette test).

It has been further held by the Commission that, a miner's refusal to perform work is protected under section 105(c) of the Mine Act if it is based on a reasonable, good faith believe that the work involves a hazard. Pasula, supra, Robinette, 3 FMSHRC, 803 at 812; Secretary v. Metric Constructors, Inc., 6 FMSHRC 226, 229-31 (February 1984), Aff'd sub nom. Brock v. Metric Constructors, Inc., 766 F.2d 469, 471-72 (11th Cir. 1985). Perando v. Mettiki Coal Corp., 4 FMSHRC 491 (1988).

In essence, it is Complainant's position that from the time of his operation until his return to work, he had refused to work as directed by his physician in order to avoid infection and possible lost of hearing. Doctor Karanjia testified, in his deposition, that he told Jack, in essence, not to go back to work in the mines, because the postoperative condition would be effected by a lot of dust and coal dust, and that Jack should have been off from work for a minimum of 6 weeks. Accordingly to Jack, when he saw Doctor Karanjia for the first time, 2 days after the operation, there was no discussion with regard with his return to work. Also, accordingly to Jack, although Doctor Karanjia gave him a slip at that time which he took to Rooke, Jack did not read the contents of the slip. Further, the record is not clear as to exactly when Doctor Karanjia told Jack not to return to work in the mines. Also, Jack's duties entitled a wide range of work, including construction work which was not in the area of the face. Further, Jack was aware that Respondent provided its employees with ear muffs which covers the ear entirely and Jack agreed that to obtain such a pair all he had to do was go to the supply room and ask for them. I find, based upon this evidence, that Complainant has not established that during the time he was off from work after his operation, he had refused to perform work based upon a reasonable belief that the work involved a hazard.

Even assuming arguendo that the Complainant herein engaged in a protected activity in not working for 11 days subsequent to his operation, his case must fail, as Jack has not met his burden

in establishing that he communicated to Respondent his refusal to work. As stated by the Commission in Secretary on behalf of Sedgmer, et al v. Consolidation Coal Company, 8 FMSHRC 303, at 307 (March 1986), "The case law addressing work refusals contemplates some form of contact or communication manifesting an actual refusal to work."

Jack asserts that his absence for 11 days subsequent to his operation on May 1, 1987, was a protected work refusal, and his discharge on June 24, was a violation of the Act. However, the record is devoid of any evidence that Jack, prior to his meeting with Respondent's agents on July 28, 1987, had communicated an actual refusal to work based on a belief that his working involved a hazard. According to Jack, when he met with McElhose some time in March 1987, prior to surgery, he merely informed him of the need of surgery and was told to go and have it. There is no testimony from Jack that at that time he communicated any refusal to work subsequent to the operation based upon a perception of any hazard. According to Jack's testimony, the only contact he had with Respondent's agents between his last day of work prior to the operation and his return to work on May 18, consisted of his presenting a slip to Rooke 2 days after the surgery. Jack did not testify to any conversation that he had with Rooke, nor did he testify with regard to the contents of the note that he presented to Rooke, as Jack had indicated that he did not read it. The note itself was not offered in evidence. Also, although a note dated April 29, 1987, from Doctor Karanjia, was in Respondent's possession indicating, in essence, that Jack will undergo surgery on May 1, 1987, and "will be off work until further notice," (RX 11), there is nothing in that note communicating specifically that Jack's contemplated absence would be to avoid exposure to hazardous aspects of his job. Further, had Jack clearly communicated to Respondent his refusal to work due to a fear of exposure to the hazards of dust and coal dust, it is likely that he would have been provided with ear muffs which would have alleviated the hazard of infection.

Therefore, for all the above reasons, it is concluded that the Complainant has not engaged in a protected activity under section 105(c) of the Act, and as such, has not established a prima facie case. Accordingly, Respondent's Motion for Summary Decision, made at the Hearing, is presently GRANTED and the Complaint is DISMISSED.

ORDER

Based on the above Findings of Fact and Conclusions of Law,
it is ORDERED that this proceeding be DISMISSED.



Avram Weisberger
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 26, 1988

ROCHESTER & PITTSBURGH COAL COMPANY,	:	CONTEST PROCEEDING
Contestant	:	Docket No. PENN 88-243-R
	:	Safeguard Notice 2885431; 5/18/88
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Greenwich Collieries No. 2 Mine
ADMINISTRATION (MSHA),	:	
Respondent	:	Mine ID 36-02404

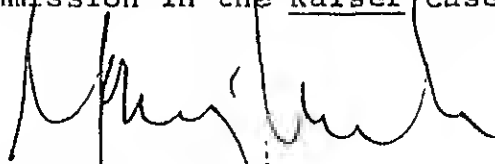
PARTIAL DECISION AND STAY ORDER

Before: Judge Melick

On May 18, 1988, a notice to provide safeguard was issued by the Secretary under section 314(b) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act," to the Rochester and Pittsburgh Coal Company (the Company). On June 16, 1988, the Company attempted to contest that safeguard notice.

Thereafter, on July 1, 1988, the Secretary filed a Motion to Dismiss on the grounds that Contestant failed to state a claim for which relief may be granted under section 105 of the Act. Under section 105(d) a mine operator may contest an order issued under section 104, a citation or a penalty assessment issued under section 105(a) or section 105(b), or the reasonableness of the length of abatement time fixed in a citation. However the safeguard notice here challenged is not within any of these categories. Accordingly the Secretary's Motion to Dismiss the Contest Proceeding is granted and the attempted contest of Safeguard No. 2575910 is dismissed.

On June 27, 1988, the contestant moved to amend its pleadings to also request a declaratory judgement holding that the subject safeguard is invalid. The proposed amendment is unopposed and comports with the procedural rules. The issue of whether a Commission Administrative Law Judge has the jurisdictional authority to grant declaratory relief is however presently before the Commission in the case of Kaiser Coal Corp. v. Secretary and UMWA, Docket No. WEST 88-131-R. Accordingly further proceedings in this case concerning the issue of declaratory relief are hereby stayed pending a decision by the Commission in the Kaiser case.



Gary Melick
Administrative Law Judge
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August 29, 1988

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 88-56-M
Petitioner	:	A.C. No. 41-03018-05513
v.	:	
	:	McDaniel Pit
BOORHEM-FIELDS, INCORPORATED,	:	
Respondent	:	

ORDER REJECTING PROPOSED SETTLEMENT

By letter and attachment received August 22, 1988, the petitioner filed a motion seeking approval of a proposed settlement by the parties for section 104(a) "S&S" Citation No. 3061374, September 10, 1987, 30 C.F.R. § 56.9073. The citation was assessed at \$276, and the petitioner seeks approval of a payment of \$20 by the respondent in settlement of the violation.

A review of the pleadings reflects that the inspector issued the citation after finding a back hoe with bad brakes and a broken tie rod broken away from the frame on the left side of the vehicle, parked at the shop area of the mine. The inspector found that the vehicle had not been tagged to prevent anyone from operating it, as required by the cited standard. Abatement was achieved within approximately 3 hours of the issuance of the citation, and this was accomplished by the mine superintendent removing the key from the vehicle.

The inspector's gravity findings, as shown on the face of the citation, reflect that an injury was reasonably likely, with permanently disabling results, and that one person would be exposed to such an injury. In support of the reduction of the initial penalty assessment for the violation, petitioner makes the following argument at page two of its motion:

Probability of injury was overevaluated since very few employees were exposed to the risk, these employees were not, during the normal course of

their work, exposed to the risk with any great frequency, or were not in the zone of danger, and the employees were not working under stress or where their attention would be distracted.

I fail to understand the relationship between an untagged parked vehicle with bad brakes and a broken tie-rod, and the petitioner's statements that few employees were exposed to a risk, that they would not in the normal course of their work be exposed to the risk with any great frequency, were not in the zone of danger, and were not working under stress or where their attention would be distracted. Such unexplained statements raise an inference that the untagged vehicle posed a hazard, and that employees may have been exposed to such a hazard.

Although the respondent's answer suggests that the cited vehicle was parked at the shop for repairs, and makes reference to a "report" prepared by the inspector stating that the vehicle was parked at the shop for repairs, petitioner's motion does not include any such information. Further, the fact that abatement was achieved by the removal of the ignition key some 3 hours after the citation was issued, raises a question as to why the key was not immediately removed from the vehicle when it was parked if in fact it was removed from service for repairs.

ORDER

In view of the foregoing, the proposed settlement IS REJECTED. The petitioner is directed to re-submit it within ten(10) days of the receipt of this Order with a clarification or explanation of its previously submitted argument in support of the civil penalty reduction in question.


George A. Koutras
Administrative Law Judge

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